Vanguard Tours, Inc.; Vanguard Interstate Tours, Inc.; Bedford Bus Co., Inc.; and David Danzeisen *and* Diana Picucci

Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO[1] *and* Diana Picucci. Cases 2–CA–17769 and 2–CB–8676

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On August 29, 1984, and June 10, 1987, respectively, Administrative Law Judge Julius Cohn issued the attached decision and supplemental decision.[2] The Respondent Employers (Vanguard) and the Respondent Union filed exceptions to the judge's 1984 decision, with supporting briefs, and the General Counsel filed an answering brief.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the 1984 decision[4] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[5] and conclusions only to the extent consistent with this Decision and Order.

I

The Respondent Employers, Vanguard Tours and Bedford Bus, a wholly owned subsidiary of Vanguard, provide school and charter bus services to school districts and other customers. Pursuant to a series of collective-bargaining agreements, the most recent being from 1978 through 1981, and 1981 through 1984, the Respondent Union represented the Employers' employees in a unit of ''full and part-time drivers, mechanics, helpers, inspectors, mechanic trainees, washers, fuelers and parts chasers.'' There are approximately 300 drivers in the recognized unit of which only 18 are full time and members of the Union. None of the part-time employees are union members. This case involves numerous allegations of violations of Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act related to the alleged disparate treatment of part-time vis-a-vis full-time drivers, various threats made during the picketing and strike undertaken by the part-timers, and the Respondent Employers' institution of a civil lawsuit in state court to halt the strike and picketing.

Over 30 years ago, in *Nassau & Suffolk Contractors Assn.*, 118 NLRB 174, 187 (1957), the Board made and emphasized the observation that we affirm and emphasize today:

> *Employees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests.*

To a significant extent (although other factors also contributed), the events that precipitated this case flowed from the Respondent Employers' and Union's ignoring that basic principle, a principle that lies at the heart of the unfair labor practice described in Section 8(a)(2) of the Act.[6]

We have little difficulty in affirming the judge's finding that Vanguard violated Section 8(a)(2) and (1) by maintaining a system whereby shop stewards who performed the function of grievance representative for the Union, and who submitted bargaining demands and participated in negotiations on behalf of the Union, were supervisors of the very employees they were supposed to represent or were clothed with the authority to act for management in Vanguard's relations with these employees.[7] See, e.g., *Jeffrey Mfg. Co.*, 208 NLRB 75, 83 (1974).

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] On November 7, 1984, the judge issued an erratum to his initial decision.

[3] The Respondent Employers have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[4] In his supplemental decision, the judge found that the Board has jurisdiction over the Respondent Employers under *Res-Care*, 280 NLRB 670 (1986); *Long Stretch Youth Home*, 280 NLRB 678 (1986); and *Rustman Bus Co.*, 282 NLRB 152 (1986). No exceptions were filed. In the absence of exceptions, the Board issued its supplemental order of August 5, 1987, adopting the findings and conclusions contained in the judge's supplemental decision and retaining jurisdiction to consider the Respondents' exceptions to the judge's 1984 decision.

[5] The Respondent Employers and the Respondent Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In excepting to the judge's finding that Vanguard's ''Destructive Criticism'' rule was an unlawfully broad rule against discussing wages, hours, and working conditions on company property, during working or nonworking time, Vanguard contends that the rule only applied to ''destructive criticism,'' constituting ''disloyalty.'' Despite its title, however, the rule is on its face broadly restrictive of Sec. 7 rights. Although the rule applies only in the presence of passengers or ''prospective passengers,'' Vanguard has not shown that it is necessary to insulate all such persons from the broad category of employee discussions subject to the rule. Cf. *Times Publishing Co.*, 240 NLRB 1158 (1979), enfd. 605 F.2d 847 (5th Cir. 1979) (newspaper's lobby area not subject to special restrictions accorded retail areas).

We find it unnecessary to pass on the correctness of the judge's finding that Vanguard's president, Danzeisen, violated Sec. 8(a)(1) by threatening employees with loss of jobs at a November 1980 meeting in Yorktown. Danzeisen's similar threats at a meeting in Ossining a week or two later would make the alleged Yorktown threats cumulative.

[6] Sec. 8(a)(2) reads, in pertinent part: ''It shall be an unfair labor practice for an employer . . . . (2) to dominate or interfere with the formation or administration of any labor organization . . . .''

[7] Because we find, in agreement with the judge, that shop stewards Sprofera, Cotto, and Martin were supervisors and agents, we find it unnecessary to pass on the question of whether Chief Shop Steward Gerald Navin was also a supervisor or an agent of management. The order would not be affected by deciding the legality of his conduct.

Shop Stewards Al Cotto and George Martin exercised independent judgment in the assignment of employees to various jobs within their respective areas of responsibility.[8] Martin testified that he tried to make work assignments fairly, so that one employee would not get all the ''gravy'' and another all the ''garbage.'' Although his assignment-making authority was limited to the full-time employees at the Bedford facility at which he acted as steward, Martin also enforced the Company's parking regulations when full-time employees were involved. Martin also believed that he had authority to order full-time employees to comply with other company policies. It is indicative of the relationship between Vanguard and the Union that Martin associated his authority over full-time employees in the enforcement of company rules with the fact that those employees were union members. Nevertheless, given the supervisory authority regularly exercised by Martin, the inference is inescapable that his authority to enforce company rules came at least in large part from the Company itself.

Shop Steward Joanne Sprofera, one of the chief actors in the events here, was an assistant dispatcher. Sprofera performed the terminal manager's supervisory duties for about 2 to 3 hours a day, after the latter left for the afternoon, and on at least one occasion gave an employee a disciplinary reprimand. In addition, Sprofera was used by Vanguard to order drivers to perform the difficult job of removing tire chains from buses.

II

Before we proceed with the major issues, we shall dispose of the Union's and the Employers' responsibility for some of the strike-related alleged misconduct of Sprofera and Cotto. The judge found that Sprofera's surveillance constituted an 8(a)(1) violation by Vanguard and an 8(b)(1)(A) violation by the Union. The judge also found that Vanguard violated Section 8(a)(1) when Sprofera told employees that they could be fired if they continued their strike activity. He further found her additional comment, that the Union's secretary-treasurer believed that the strike was illegal and that the strikers could be fired, to constitute a violation of Section 8(b)(1)(A) by the Union. Cotto engaged in similar, though not identical, conduct. He told an employee that it was foolish to go on strike. Cotto further reported to employees the opinion of the union secretary-treasurer that the strike was a wildcat strike which violated the collective-bargaining agreement and would result in their discharge. The judge found 8(a)(1) and 8(b)(1)(A) violations.

We agree that Sprofera's surveillance, and her threat of discharge, were attributable to Vanguard and violated Section 8(a)(1). Thus, during the strike, Sprofera was instructed to go out and take down the names of the employees on the picket line.[9] She did so and, according to the credited testimony, informed the strikers that they were, or were going to be, fired. Later that day, Danzeisen, the president of Vanguard, told a group of five employees that the strikers had quit their jobs. We agree with the judge that Danzeisen's statement was unlawful, as it was tantamount to discharging the strikers. It also constituted, implicitly, a ratification by Vanguard of Sprofera's threat of discharge. Thus, even if Sprofera was not a supervisor, the strikers would have been wholly justified under these circumstances in concluding that the threat made by Sprofera in carrying out her instructions emanated from Vanguard itself. That being the case, Sprofera's writing down the names of the pickets contemporaneously with her threat of discharge also would have appeared to a reasonable employee to be an act of surveillance directed by Vanguard.

However, even Sprofera's dual status as shop steward does not make the above conduct attributable to the Union. Her conversation with the employees leads to the inference, drawn above, that she was acting and speaking on Vanguard's, not the Union's behalf. Her additional remark, relating the Union's opinion that the strike was illegal, was merely an expression of that opinion and carried no threat on the Union's part. Therefore, we reverse the judge's findings of 8(b)(1)(A) violations during that incident and dismiss the allegations.[10]

Similarly, Cotto's reporting of the union officer's opinion carried no threat of union action. His statement that an employee was foolish to go on strike is also devoid of threat. We therefore reverse and dismiss the allegations of 8(a)(1) and 8(b)(1)(A) violations by the Respondents, acting through Cotto.

The judge found 8(a)(1) and 8(b)(1)(A) violations in a separate incident in which Sprofera shoved part-time employee Rescigno in response to Rescigno's failure to answer a radio call, directed to her in the bus she was driving. Rescigno presumably failed to answer because she knew the call was for part-time drivers to assist in putting tire snow-chains on the buses. The judge found that Sprofera assaulted Rescigno because she en-

In affirming the judge's findings in this regard, we note that he relied in part on *Three Hundred South Grand Co.*, 257 NLRB 1397 (1981), and *Schwenk Inc.*, 229 NLRB 640 (1977). In *Power Piping Co.*, 291 NLRB 494 (1988), decided after the judge issued his decision, the Board overruled *Three Hundred South Grand* and *Schwenk* to the extent they suggest that any single factor may be assigned controlling weight in determining whether an employer has unlawfully interfered with the administration of a union through its supervisors' participation in intraunion affairs. Instead, all the circumstances must be analyzed in arriving at such a determination. Id. at 497. *Power Piping*, however, clearly does not require a different result in this case.

[8] We find, for the reasons discussed by the judge, that Cotto is a statutory supervisor.

[9] Sprofera testified that she received this instruction from either Danzeisen or Silvanie, Vanguard's general manager.

[10] For the reasons stated by the administrative law judge, Member Cracraft would find that Sprofera's comments were made in the context of her dual role as supervisor and union steward and therefore violated Sec. 8(b)(1)(A).

gaged in what was, by the judge's implication, concerted protected activity with other part-time drivers, and that such retaliation constituted a violation of Section 8(a)(1) on behalf of Vanguard and a violation of Section 8(b)(1)(A) on behalf of the Union. Vanguard excepts to this finding *solely* on the ground that Sprofera is neither a supervisor nor its agent. We reject that contention and affirm the 8(a)(1) finding. On the other hand, we see no connection between this incident and the Union. Sprofera acted here in her capacity as a supervisor, frustrated in her attempt to exercise her authority to have certain work performed. We dismiss the 8(b)(1)(A) allegation.

III

One of the major issues in this case concerns the Respondents' joint maintenance of one system of wages, hours, and benefits for employees classified as ''regular'' or ''full-time'' employees and another, less favorable, system for ''part-time'' drivers. Pursuant to the Respondents' 1978–1981 collective-bargaining agreement, all of the ''regular full-time'' employees were subject to a union-security provision requiring that they ''become and remain members of the Union as a condition of their employment.'' Part-time drivers, on the other hand, were discouraged from seeking union membership, and some were told by shop stewards that they could not join. Presumably as a result, all ''regular'' employees, but no ''part-time'' employees, were members. This distinction underlies the General Counsel's contention that the disparate treatment of full-time and part-time employees was based on union membership. The judge found merit in this contention, and found that Vanguard thereby violated Section 8(a)(1), (2), and (3) and that the Union violated Section 8(b)(1)(A) and (2) by its participation in such a discriminatory scheme.

From the point of view of the ''part-time'' drivers, there is undoubtedly much that is unfair in the system. However, we do not find that the discrimination practiced here was based on union membership. The problem with the General Counsel's case on this issue is that the disparate treatment accorded the two classes of employees, ''regular'' and ''part-time,'' is permitted by the 1978–1981 contract. Moreover, we cannot dismiss Vanguard's contention that even if all of the ''part-time'' employees had become union members, Vanguard would have had no obligation to convert any of them to ''regular'' status under the contract.

The contract itself is not under attack here. Neither is it alleged that its negotiation by the Union violated the Union's duty of fair representation.

The contract, after reciting Vanguard's recognition of the Union as the exclusive bargaining agent for all full-time and part-time employees in certain job classifications, sets forth the following definitions:

> A regular employee is one who works as a full-time employee for a period of two (2) months. A full-time employee should be defined as one whose normal trips consist of seven (7) hours constantly during the normal work day.

The ''normal work day,'' despite the 7-hour minimum quoted above, is 8 hours, beginning for drivers at various times between 6 and 8 a.m.

As there is no separate definition of part-time employees, that category presumably included all unit employees who did not fall within the quoted definitions. The principal effects of failing to qualify as a ''regular'' or ''full-time'' employee, besides exempting an employee from the union membership requirement, are that one is paid a lower wage rate, is not automatically ''on the clock'' for a full 8-hour day, and does not participate in major fringe benefit plans.[11]

The General Counsel contends and the judge found that there was union membership-based discrimination because nonmember part-time drivers who had average workweeks of over 35 hours, some for extended periods, were not reclassified as ''regular'' employees and given the benefits accompanying that status. The first of our difficulties with this finding is that the proof is insufficient to show that any of these drivers met the rather stringent requirements of the contractual definitions. In the absence of further evidence or clarifying argument, we cannot be clear on the proper interpretation of the requirement that an employee work ''as a full-time employee for a period of two (2) months.'' Must this full-time work be consecutive? If so, the record does not reveal whether any part-time drivers did so. There is evidence that some part-time drivers complained to the Union that they qualified for ''regular'' status but had not been reclassified. However, the Union ascertained that the hours claimed as making them eligible were not all within the ''normal working day.'' There is no evidence that any employees filed formal grievances or otherwise challenged the Union's representations. Given this, neither Vanguard nor the Union had a *legal* obligation to see that they were reclassified.[12]

The main impediment to the use of this proceeding to remedy the perceived unfairness of the dual system of compensation and benefits is that the contract itself (which is not subject to attack here) leaves Vanguard free to do exactly what it did, which was to schedule part-time drivers so as to prevent them from qualifying for ''regular'' status, and thus maintain a quota system limiting the number of ''regular employees.'' But there is no linkage between union membership and being a

[11] Although the contract requires part-time employees to pay agency-shop fees to the Union, that provision has not been enforced.

[12] It might be argued that the dual status of the shop stewards-supervisors made the filing of grievances appear to be futile. However, it is equally inferable that the employees agreed that they lacked viable contractual claims.

''regular employee'' other than the requirement, once an individual became a regular employee, that he join the Union pursuant to the union-security clause. Simply joining the Union without having previously worked the requisite number of hours for the contractually specified period would not qualify an individual as a ''regular'' employee.[13] Thus the two-tier wage and benefit system provided no objective basis for employees to feel ''encouraged'' to join the Union. Nor are we able to infer, on this record, that Vanguard's purpose in maintaining a quota on ''regular'' employee status was to encourage union membership or to make union membership more attractive. Vanguard's economic motivation for limiting the number of ''regular'' employees appears to be paramount, and in any event would be sufficient to rebut a prima facie case if one had been established.[14] For these reasons, we dismiss the allegations of unlawful maintenance of the disparate system.

We must also reverse the judge's finding of unalleged violations of Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and 8(b)(2) by the Respondent Employer's and Union's settlement of a lawsuit instituted by the Union to enforce supplemental unemployment benefit payments. Both the Respondents have excepted, arguing that the violations found are barred by Section 10(b). We agree. The only record evidence as to such a settlement indicates that it occurred in 1978 or 1979. The findings are thus barred by Section 10(b).[15]

IV

Frustrated by a number of assorted grievances (we do not use this term in the technical sense), the part-time drivers struck on January 9, 1981. The nature of that strike is another of the major issues presented here.

The strike followed a lull in contract negotiations after Vanguard offered the part-timers a small raise and they rejected it. The lull in negotiations overlapped the 2-week Christmas vacation. When the drivers returned to work, they were instructed to remove tire chains from their buses. In the past, the practice was first to drive the buses out of the ''yard'' to a blacktopped area. This time, however, they were instructed to stay inside the ''yard.'' Removing the chains inside the ''yard'' was a messier job, and particularly upset the part-timers. Some of them thought that the chains had been put on in the first place just to ''aggravate'' them. A group of part-timers met to discuss their frustrations, including their dissatisfaction with the wage disparity, with the failure of the Union's negotiator to communicate with them, with their being ''bound'' to the Union, with having Sprofera as their shop steward in name but in reality ''strictly a supervisor,'' and with the tire chain incident. They decided to strike and form a picket line where they might ''get the attention of the union, maybe the school board,[16] maybe somebody, somewhere, somehow would help.''

The cause of the strike is important, because the strikers arguably were bound by an unusual ''no-strike'' clause which provided that:

> There shall be no strike or lock-out or any job action of any kind taken by any employee, under the provisions of this Agreement, without the express prior written consent of the Secretary-Treasurer and Business Manager of the Union. Employees who engage in unauthorized strike activity or unauthorized job action shall be subject to immediate discharge, without recourse.

Although several objections might be raised to the application of this provision to the strikers, we agree with the judge that the strike was an unfair labor practice strike that was protected despite this provision.

The judge relied in large part on what he found to be the unlawful discrimination in wages and benefits as between members and nonmembers of the Union. We have reversed the unfair labor practice findings relating to this economic discrimination, except for the pension plan discrimination. However, we find that a substantial contributing factor to the strike was the system of dual representation by shop steward-supervisors and the sense of futility that system caused with regard to the part-timers' expectation of having the Union assert itself in their behalf. This sense of futility was exacerbated by the fact that the supervisors were not only the employees' grievance representatives, but also served as union contract negotiators.

The 8(a)(2) violations found here, which, in part, caused the strike,[17] were clearly ''destructive of the foundation on which collective bargaining must rest.'' *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 281 (1956). The strike was, therefore, protected concerted

[13] It is the legally valid contractual barrier to ''regular'' status that distinguishes this case in this respect from *Narragansett Restaurant Corp.*, 243 NLRB 125, 130 (1979), on which the judge relied. There, the distinction between ''regular'' and ''casual'' employees had no objective basis except for union membership.

[14] The same cannot be said for Vanguard's reduction of employee Gerosa's hours in order to prevent her from ''getting into the Union.'' That credited admission by a Vanguard supervisor constitutes a prima facie case of membership-based discrimination. Vanguard's defense, that Gerosa's deleted run could be performed more economically by a regular full-time driver, was discredited as not being the real reason for the reduction of hours. We agree with the judge that Vanguard has not carried its burden of rebuttal under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[15] We adopt the judge's finding that the Respondents' maintenance of a pension plan that, on its face, made participation depend on union membership, violated Secs. 8(a)(1), (2), and (3); 8(b)(1)(A); and 8(b)(2).

[16] Vanguard provides transportation for public school students.

[17] A strike is an unfair labor practice strike if one of the purposes of the strike is to protest the employer's unfair labor practices. See, e.g., *Airport Parking Management*, 264 NLRB 5, 11 (1982), enfd. 720 F.2d 610 (9th Cir. 1983).

activity, and did not violate the contractual ''no-strike'' provision. *Servair, Inc.*, 265 NLRB 181, 183–184 (1982), enfd. 726 F.2d 1435 (9th Cir. 1984).

It is also arguable that, aside from the existence of the ''no-strike'' clause, this strike was unprotected because it was an unauthorized strike that derogated the Union's representative status. *River Oaks Nursing Home*, 275 NLRB 84, 86 (1985). However, whether or not that doctrine would otherwise be applicable, we decline for obvious reasons to apply it where, as here, the strike is in response to an unfair labor practice that was calculated to ''deprive employees of any meaningful representation.'' *Lustrelon, Inc.*, 242 NLRB 561, 571 (1979).

Having found that the strike was protected, we affirm the judge's finding that Vanguard violated Section 8(a)(1) by effectively discharging some of the strikers (by telling them that they were considered to have quit), by offering them reinstatement with loss of seniority, and by conditioning their reinstatement on their signing a stipulation limiting certain of their legal rights.[18]

V

The strike, in turn, led to the filing of a state court lawsuit which the judge found violated Section 8(a)(1) and (3). On Friday, January 9, 1981, the day the strike started, Vanguard instituted a lawsuit in a New York State court against 24 striking employees, seeking a permanent injunction and $500,000 in damages. The suit was based on the no-strike clause. Vanguard acted immediately to obtain temporary restraining orders (TROs) against the picketing. Thereafter, Vanguard began serving the 24 named defendants with TROs over the January 10–11 weekend. No picketing occurred the weekend of January 10–11. The TROs ordered all 24 employees to appear in court on January 15.

Picketing ceased on Monday, January 12, after service of the TROs.[19] Between the time Vanguard served the TROs and the January 15 hearing date, it released all the employees, except the seven strike leaders, from the requirement that they appear in court, and offered all but the seven strike leaders conditional reinstatement.[20] On January 15 the strike leaders appeared in state court and were advised by the judge to obtain an attorney.[21] At that time, Vanguard formally withdrew the charges against all but the seven strike leaders. In this regard, John Silvanie, Vanguard's general manager, testified that he had received reports that employees Genco, Papineau, Dickerson, Stueck, Hughes, Picucci, and Resigno had particular involvement in the strike and that he had ''decided not to offer reemployment to any of those people [strike leaders] that I felt were misinforming the part-timers.'' Silvanie also acknowledged that the seven strike leaders were, in his view, the ringleaders of the strike.

The lawsuit against the seven strike leaders was continued to January 23. On January 23 the seven strike leaders appeared in court with an attorney. Vanguard requested dismissal of the suit against those seven employees, and the judge granted the request.

In deciding whether any aspect of the lawsuit violated the Act, we must be guided by *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). *Bill Johnson's* involved the Board's attempt to enjoin a pending state court suit. However, the Supreme Court's opinion contains general guidance with respect to cases where, as here, the lawsuit has terminated without a judgment on the merits.[22]

The Court's actual holding, in brief, was that the dual policies of the first amendment right to file meritorious suits and the State's compelling interest in the maintenance of domestic peace combine to protect from Board interference a state lawsuit over tortious conduct during a labor dispute, absent a sustainable finding that the suit has no reasonable basis. As the Court stated in *Bill Johnson's:*

> [I]f the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in the state court, however, or *if his suit is withdrawn or is otherwise shown to be without merit*, the employer has had its day

[18] We find it unnecessary to pass on whether these actions also violated Sec. 8(a)(3), as the remedy will be the same.

[19] Even though the picketing had ceased on January 12, on that same day, Vanguard obtained an order to show cause for holding 10 striking employees in contempt of court for failing to comply with the TROs. The order to show cause named six of the seven strike leaders (it failed to name Stueck), and four additional employees.

[20] The other defendants also had signed stipulations of discontinuance of the lawsuit that Vanguard had presented to them.

[21] Contrary to Vanguard's contention, there is no evidence that the state judge granted its application for a preliminary injunction. On January 15, he merely extended the temporary restraining order, which action was not contested. Significantly, he announced in open court that he had not read all the papers in the case and was not aware of all the issues presented, but knew that the suit was based on a no-strike clause. When informed that the defendants were not union members, the judge expressed puzzlement as to how the clause applied to them.

[22] Because the lawsuit has terminated, we need not decide now whether this was a suit that would have been dismissible on the basis of Federal law preemption, inasmuch as the lawfulness of the strike sought to be enjoined is one of the very issues before us in the instant case (*Alabama By-Products Corp. v. Mine Workers Local 1288*, 109 LRRM 2427 (N.D. Ala. 1981)), or whether the suit was maintainable under Sec. 301(a) of the Act as one over which the Board shares jurisdiction with Federal and state courts. (*Smith v. Evening News Assn.*, 371 U.S. 195 (1962); *Avco Corp. v. Machinists Lodge 735*, 390 U.S. 557 (1968).) See Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 559–561, 570–572 (1963); *Transit Union v. Lockridge*, 403 U.S. 274, 292–301 (1971). See generally Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972). We assume for the purposes of this discussion that Vanguard had a reasonable basis at least for believing that the state court had jurisdiction under Sec. 301(a) of the Act. As *Avco Corp.*, supra, notes, jurisdiction to entertain a claim is distinct from the question whether a claim has merit.

> in court, the interest of the State in providing a forum for its citizens has been vindicated, and *the Board may then proceed to adjudicate the . . . unfair labor practice case.*

461 U.S. at 747 (emphasis added). The Court's continued emphasis on some showing of lack of merit as a prerequisite to adjudication of the question of retaliatory motive implies that even at the postlawsuit stage, we may not hold unlawful the maintenance of *any* meritorious lawsuit.

The administrative law judge, implicitly adopting this approach, took the quoted *Bill Johnson's* language to mean that the withdrawal of a lawsuit is for this purpose equivalent to a showing of lack of merit. At first blush, this appears to be a reasonable interpretation of the Court's language. But the facts of this case make it unnecessary to announce so broad a proposition.[23] For the reasons set forth below, while we find that Vanguard's initial filing of the lawsuit was not unlawful, we find that Vanguard's proceeding with the suit, after the suit had accomplished its stated purpose, was nonmeritorious and retaliatory, and that our traditional remedies will apply.[24]

First, we find that the General Counsel has not shown, by a preponderance of the evidence, that the suit was originally filed out of a retaliatory motive. As we find below, the continuation of the suit after January 15 against the strike leaders, when the strike had been broken and the suit had been dismissed against the other strikers, was clearly for the purpose of retaliating against the strike leaders. However, the suit had been filed and, until January 15, maintained against 24 of the strikers, with at least a colorable basis in the collective-bargaining agreement. Thus, it is not apparent that the suit was, in its inception, intended to retaliate either against the striking employees in general or specifically against the strike leaders. Accordingly, we do not find that the filing of the lawsuit, or its maintenance before January 15, was unlawful.

Vanguard's continuation of the suit after the strike, in effect, had ended is a different matter. In this regard, we emphasize that the stated purpose of the suit was to end the strike and the picketing, and to collect the damages that continuation of the strike might have caused. By January 15, when the remaining defendants appeared in court in response to the original order to show cause, the picketing had ceased (indeed, had ceased 3 days previously) and the strike was effectively broken. Thus, Vanguard was satisfied that all the strikers whom it would permit to return to work had or were about to do so. Nevertheless, Vanguard pursued the litigation for another week with no apparent purpose but to punish the strike leaders. Although in other circumstances a plaintiff may have been entitled to continue to seek a permanent injunction[25] and $500,000 in damages, Vanguard's actions belie these as its real motivations.

In this case the issues of the merits of the lawsuit and its motivation are intertwined. At least at the stage at which Vanguard finally withdrew the suit, we take the withdrawal, at least presumptively, to be an admission by Vanguard that the suit lacked merit. We hold that such a prima facie showing is sufficient, in the circumstances presented here, to satisfy the *Bill Johnson's* postlawsuit requirement of lack of merit and to place on Vanguard the burden of rebutting the inference that the suit lacked merit after January 15. Vanguard attempted to rebut this inference through two contentions. Vanguard's first contention is that the state court granted a preliminary injunction, thus showing that Vanguard had convinced the court that it had a substantial likelihood of succeeding on the merits. But, as discussed above, at footnote 21, there was no preliminary injunction issued, or any other finding of probable merit. Vanguard's second contention is that it withdrew the suit once it had achieved its desired and lawful results. The difficulty with this contention is that Vanguard did not withdraw the suit when it achieved all of those results, but continued it in order to harass the strike leaders. Only when it achieved this unlawful result did Vanguard withdraw the suit. Because of the undisputed evidence of discriminatory motivation, discussed above, and the lack of any argument by Vanguard as to why the suit was dismissed as to all others, we find that the evidence supports a finding that Vanguard's actions were taken against the seven strike leaders in retaliation for their leadership in the strike. The continuation of the suit coerced employees

[23] That proposition, unless qualified, could discourage withdrawal of claims and thus promote, rather than inhibit, nonmeritorious litigation. We are reluctant to read such a result into the Supreme Court's language in *Bill Johnson's*, absent more specific direction from the Court itself. Cf. our decision on remand in *Bill Johnson's*, in which we declined to draw the inference that settlement of a claim establishes that the claim lacks merit, in part because such a rule would discourage settlements. *Bill Johnson's Restaurants*, 290 NLRB 29, 31 (1988).

[24] Because the filing of the suit cannot be found unlawful absent a retaliatory motive, we need not decide whether the suit was nonmeritorious at the outset.

Contrary to his colleagues, Member Devaney would find that Vanguard's motivation for filing the suit was illuminated by the actions post-January 15 in continuing the suit against the strike leaders. For this reason, he would find that Vanguard's filing and maintaining this lawsuit, including contempt proceedings, against employees was in retaliation for their engaging in a protected strike.

[25] For example, nothing in this decision should be read to imply that the filing of a suit seeking a *Boys Markets* injunction, without more, will violate the Act, even if the injunction is denied. *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970). Because such a suit is the employer's only means of enforcing a contractual no-strike clause, the mere filing of such a suit does not imply a retaliatory motive.

in their right to engage in what we have found to have been a lawful strike, and thus violated Section 8(a)(1).[26] We so find.[27]

AMENDED CONCLUSIONS OF LAW

1. Delete Conclusions of Law 3(a), 5, 7, 14(b), 14(d), 14(e), and 15 and renumber accordingly. Renumbered Conclusions of Law 8 and 9 are amended by deleting references to ''Union'' activities and the violations of Section 8(a)(3).

2. Substitute the following for renumbered Conclusion of Law 11.

''11. By maintaining a civil lawsuit against certain striking employees who had been engaged in an unfair labor practice strike and by seeking to have them held in contempt of court when it no longer had a nonretaliatory motive for doing so, Respondent Vanguard violated Section 8(a)(1) of the Act. Additionally, by requiring certain of the named defendants in said civil action, as a condition of reinstatement, to sign a stipulation of discontinuance of the action which provided, among other things, for reinstitution of the lawsuit if said defendants engaged in similar activities, Respondent Vanguard further violated Section 8(a)(1) of the Act.''

3. Substitute the following for renumbered Conclusion of Law 13.

''13. Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by executing and maintaining a collective-bargaining agreement with Respondent Vanguard which provided for a pension plan in which participation was based on membership in the Union.''

ORDER

A. The National Labor Relations Board orders that Respondents Vanguard Tours, Inc. and Bedford Bus Co., Inc., collectively the Respondent Company, Ossining and Yorktown, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of jobs, discharge, and closure of a terminal if they persist in seeking increased wages and better working conditions.

(b) Coercing employees in the exercise of their rights by warning them to stay out of labor problems, and assaulting employees who were engaged in protected concerted activities.

(c) Engaging, or attempting to engage, in illegal surveillance of the activities of employees engaged in a strike in protest of Respondent Company's unfair labor practices.

(d) Threatening employees with loss of seniority, loss of benefits, and discharge unless they abandoned their strike activity.

(e) Promulgating and maintaining an overly broad rule that prohibits discussions of wages, hours, and working conditions at all times including employees' nonworking time.

(f) Interfering with the administration of Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Respondent Union) by recognizing or dealing with any person as shop steward or any other agent of that Union, while that person is its supervisor or agent.

(g) Maintaining and giving effect to a provision in a collective-bargaining agreement with the Union that limits eligibility to participate in a pension plan to those employees who are members of the Respondent Union.

(h) Discharging or otherwise disciplining employees because they engaged in a protected strike, work stoppage, or other concerted activity for their mutual aid or protection.

(i) Refusing to reinstate in a timely fashion, or to reinstate at all, unfair labor practice strikers, or otherwise discriminating against them in their hiring tenure.

(j) Further conditioning reinstatement of unfair labor practice strikers on their signing a stipulation of discontinuance of litigation instituted against them which bound reinstated employees to refrain from certain protected concerted activities.

(k) Discouraging union membership of employees by reducing the number of hours of their employment.

(l) Maintaining a baseless lawsuit, including contempt proceedings, against employees in retaliation for their engaging in protected concerted activities.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the following named employees: Helen Genco, Florence Parsons, Mary Rescigno, Camille Papineau, Joseph Hughes, Rosemarie Steuck, Lauren Dickerson, and Diana Picucci immediate and full reinstatement to their former jobs or, if those positions no

[26] Because the remedy will be the same whether or not we find that continuation of the lawsuit violated Sec. 8(a)(3) as well, we find it unnecessary to pass on that allegation.

Athough we have not adopted all the judge's unfair labor practice findings, we shall retain his recommended broad cease-and-desist orders, as the remaining violations warrant them under *Hickmott Foods*, 242 NLRB 1357 (1979).

[27] In accordance with Board precedent, Member Cracraft would find that a respondent, once put on notice that its lawsuit is nonmeritorious, is entitled to a reasonable amount of time within which to refrain from pursuing a lawsuit. *Laborers Local 261 (Skinner, Inc.)*, 292 NLRB 1035 fn. 6 (1989). However, under the unique circumstances of this case, she concurs in the finding that Vanguard's continuation of its state court action against the seven strike leaders violated Sec. 8(a)(1). Because of the undisputed evidence of discriminatory motivation, and the lack of any argument by Vanguard as to why the suit was reasonably continued against the strike leaders when it was dismissed as to all others, Member Cracraft agrees that the evidence supports a finding that Vanguard's actions were taken against the seven strike leaders in retaliation for their leadership role in the strike. Accordingly, she concurs in the 8(a)(1) finding on this basis.

longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for lost earnings and other benefits in the manner set forth in the remedy section of the judge's decision.[28]

(b) Make whole those drivers listed in footnote 10 of the remedy section of the judge's decision, and others similarly situated, for losses they may have sustained during the period of their conditional reinstatement following discharge.

(c) Make whole those employees named as defendants in the civil action and contempt proceedings unlawfully continued against them in the Supreme Court of the State of New York for losses they may have sustained as a result of such litigation, including all legal expenses incurred in the defense of such suits.

(d) Jointly and severally with Respondent Union, make whole those employees who were unlawfully excluded from participation in the pension fund, for any loss of benefits and/or contributions that should have been made to the fund on their behalf for a period commencing 6 months prior to the filing of the charges.

(e) Jointly and severally with Respondent Union, compensate the pension fund for any administrative expenses and loss of interest incurred by such fund as a result of its acceptance of retroactive benefit payments.

(f) Make employee Gloria Gerosa whole for any loss of earnings or other benefits she may have suffered by reason of the unlawful reductions of her hours, in the manner set forth in the remedy section of the judge's decision, and, in addition, convert her to full-time status.

(g) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay and other sums due under the terms of this Order.

(h) Post at its principal office and terminals copies of the attached notice marked ''Appendix A.''[29] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent Company's authorized representative, shall be posted by the Respondent Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Company to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the receipt of this Order what steps Respondent Company has taken to comply.

B. The National Labor Relations Board orders that Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Respondent Union), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing employees in the exercise of their Section 7 rights by its shop stewards and agents advising them to stay out of labor problems and not get involved.

(b) Refusing to show copies of the collective-bargaining agreement to bargaining unit employees at their request.

(c) Including in its collective-bargaining contracts with Respondent Company any provisions that require membership by employees in the Respondent Union as a condition for participation in pension plans.

(d) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Company, and in the manner set forth in the remedy section of the judge's decision, make whole any employees who may have suffered loss of benefits by reason of their exclusion from a pension plan for which eligibility was limited to union members.

(b) Jointly and severally with Respondent Company, compensate the pension fund for any administrative expenses and loss of interest incurred by the fund as a result of their acceptance of retroactive benefit payments.

(c) Post at all of the Respondent Union's business offices and meeting halls copies of the attached notice marked ''Appendix B.''[30] Copies of the notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt, and be maintained by it for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish to the Regional Director for Region 2 signed copies of the notice for posting by Respondent Company in places where notices to employees are customarily posted.

[28] Interest shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[30] See fn. 29, supra.

(e) Notify the Regional Director in writing within 20 days from the receipt of this Order, what steps have been taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges unfair labor practices against David Danzeisen, individually.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed with respect to allegations not specifically found to have violated the Act.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with loss of jobs, discharge, and closure of terminals because they seek increased wages and better working conditions.

WE WILL NOT discharge or otherwise discriminate against our employees because they engaged in protected concerted activities.

WE WILL NOT warn employees to stay out of labor problems and assault employees because they engaged in protected concerted activities.

WE WILL NOT keep the activities of our employees who are engaged in a strike in protest of unfair labor practices under surveillance.

WE WILL NOT threaten unfair labor practice strikers with loss of seniority, loss of benefits, and discharge unless they abandon their strike.

WE WILL NOT create a rule or try to enforce a rule prohibiting solicitation or discussion of wages, hours, and working conditions by our employees during nonworking time.

WE WILL NOT interfere with the administration of Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO by recognizing or dealing with any person as shop steward or other agent of the Union while that person is our supervisor or agent.

WE WILL NOT include or maintain in any collective-bargaining agreement with Local 456, any provisions that require membership in such Union as a condition for participation in a pension plan.

WE WILL NOT discharge employees who are striking in protest of our unfair labor practices; nor will we reinstate such discharge strikers conditionally.

WE WILL NOT maintain a baseless lawsuit, including contempt proceedings, against employees in retaliation for their engaging in protected concerted activities, nor will we discontinue such lawsuits on condition that they be reinstituted if employees engage in similar activity.

WE WILL NOT curtail the hours of employment of employees because they engage in union or other protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Helen Genco, Mary Ann Rescigno, Camille Papineau, Rosemarie Steuck, Florence Parsons, Lauren Dickerson, Joseph Hughes, and Diana Picucci immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole by the payment of backpay with interest.

WE WILL make whole those strikers who were conditionally reinstated for any loss of pay or benefits incurred during the period of their unlawful conditional reinstatement, with interest.

WE WILL make Gloria Gerosa whole for any loss of earnings or other benefits sustained by her during the period of our curtailment of her working hours, with interest, and convert her to full-time status.

WE WILL make whole, jointly and severally with the Union, those employees who were unlawfully excluded from participation in the pension fund, for any loss of benefits and/or contributions that should have been made to the fund on their behalf for a period commencing 6 months prior to the filing of the charges, with interest.

WE WILL jointly and severally with the Union compensate the pension fund for any administrative expenses and loss of interest incurred by such fund as a result of its acceptance of retroactive benefit payments.

WE WILL make whole all named party defendants in the civil suit and contempt action unlawfully continued by us against them in the Supreme Court of the State of New York, for all losses and legal expenses incurred in the defense of the lawsuit.

VANGUARD TOURS, INC.; BEDFORD BUS CO., INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, by our shop stewards and agents, advise employees to stay out of labor disputes and not get involved.

WE WILL NOT refuse to show the collective-bargaining agreement to employees at their request.

WE WILL NOT include or maintain in any collective-bargaining agreement with Vanguard Tours, Inc., Bedford Bus Company, or any other employer, any provisions that require membership in our Union as a condition for participation in pension funds.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, jointly and severally with Vanguard Tours and Bedford Bus Co., make whole those employees who were unlawfully excluded from participation in the pension fund for any loss of benefits and for contributions that should have been made to the fund on their behalf for a period commencing 6 months prior to the filing of the charges.

WE WILL jointly and severally with Vanguard Tours and Bedford Bus Co., compensate the pension fund for any administrative expenses and/or interest incurred by such fund as a result of its acceptance of retroactive benefit payments.

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO

Michael J. DiMattia, Esq. and *Mary Ann Mills, Esq.*, for the General Counsel.

Joseph H. Rosenthal, Esq. and *Stephen H. Kahn, Esq. (Friedlander, Gaines, Cohen, Rosenthal, and Rosenberg)*, for Respondent Company.

Roy Barnes, Esq., of Hempstead, New York, for Respondent Union.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge. This case was tried in New York, New York. On charges filed in Case 2–CA–17769 on January 15, and served on January 16, 1981, and in Case 2–CB–8676 filed on January 21 and served on January 22, 1981, both charges being thereafter amended, the Regional Director for Region 2 issued an order consolidating cases and a consolidated complaint on March 31, 1981, and subsequently an amended consolidated complaint on December 15, 1981. The amended complaint alleged that Vanguard Tours, Inc., and other named corporations (collectively Respondent Company or Vanguard) and David Danzeisen, an individual, violated Section 8(a)(1), (2), and (3) of the Act; and that Local 456, International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America (Respondent Union) violated Section 8(b)(1)(A) and (2) of the Act. Moreover at the hearing the General Counsel submitted several amendments to the complaint which were received. Respondents filed answers generally denying the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties submitted briefs which have been carefully considered.

On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Respondent Vanguard Tours, a New York corporation, maintains its principal office and place of business in Ossining, New York, and a facility in Yorktown, New York.[1] In addition, Respondent Bedford Bus Co., Inc., a wholly owned subsidiary of Vanguard Tours, also has an office and place of business in Ossining, New York. Both Vanguard Tours and Bedford Bus have been engaged in providing school and charter bus transportation and related services. Annually Respondent Company in the course and conduct of its operations, derived gross revenues in excess of $250,000, of which it received revenues in excess of $50,000 for services performed in States other than the State of New York. Moreover, Respondent Company purchased and received goods valued at more than $50,000 annually from points outside the State of New York. The complaint alleges, Respondent Company admits, and I find that it is an employer engaged in comnerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Vanguard Tours had six terminals at the time of the hearing from which it serviced a number of school districts. Bedford Bus, a wholly owned subsidiary of Vanguard Tours, maintained one terminal including a service and parking yard. David Danzeisen, named in the complaint as an individual Respondent, is the sole stockholder of Vanguard Tours, and also the president of the corporation. John Silvanie, the general manager of Vanguard and Bedford, runs the day-to-day operation of the companies. However, both Danzeisen and Silvanie are involved in labor relations and negotiations.

Respondent Company provides school and charter bus services on the basis of contracts with school districts which are obtained as a result of public bids. These agreements also provide for charter, field, and athletic trips for the school districts. In addition Respondent Company does some business with customers other than school districts which result in charter trips. During the period involved in this proceeding, according to Silvanie, Respondent Company employed about

[1] At the hearing the General Counsel withdrew the allegations in the complaint insofar as they affected Vanguard Interstate Tours, Inc. and Westchester Coach, Co., Inc., as the former no longer has any employees, and the latter has been sold since 1978.

600 employees of whom approximately half were drivers and the balance were mechanics, other classifications of garage and maintenance employees, and clerical employees. The Company owned or leased approximately 300 buses and 100 vans.

Pursuant to a series of collective-bargaining agreements, the most recent being from 1978 through 1981, and 1981 through 1984, Respondent Union represented the Company's employees in a unit of ''full and part-time drivers, mechanics, helpers, inspectors, mechanic trainees, washers, fuelers and parts chasers.'' However it is undisputed that of the approximately 300 drivers, only 18 are full-time drivers and members of the Union. None of the part-time drivers are union members.

In addition, there appears to be great disparity as to wages and benefits received by full-time vis-a-vis part-time drivers. Thus in the 1978–1981 agreement, full-timers received $1.24 an hour more than part-timers, and full-time drivers obtained numerous benefits such as pension, health and welfare insurance, a number of paid holidays, and sick days as well as vacation and severance pay, and others. The part-timers only received six paid holidays and none of the other benefits. The wage rate referred to above was for the regular work of driving children in buses or vans to school. The rates were different for charter work but the full-time drivers performing that work received approximately $3 more than the part-timer who may be doing the same charter work assignment. The nature of the job was such that there would be time intervals between taking children to school and picking them up and the practice was for part-timers to punch in and out for each assignment, while the full-time drivers would punch the clock only at the beginning and end of a day. This was so even though the full-timers, members of the Union, would also be idle while waiting for their next assignment. On occasion drivers, either part-timer or full-timer, would perform errands or other work, not busdriving, and in those situations the full-timers received higher rates of pay than the part-timers.

The 1978–1981 collective-bargaining agreement defined the full-time employee as follows:

> A regular employee is one who works as a full-time employee for a period of two (2) months. A full-time employee should be defined as one whose normal trips consist of seven (7) hours constantly during the normal work day.

The 1981–1984 agreement amended this provision by first changing the nomenclature to ''regular bus driver'' and ''bus driver,'' and then defined a regular driver as an employee who worked on routes pursuant to contracts with Boards of Education for a minimum of 420 hours each eligible quarter. Further a driver, to become or remain a regular driver, must work those hours during each of two consecutive quarters.

What is clear is that as of the time of the hearing no driver was classified as a full-timer or regular driver at Bedford since Respondent Company purchased that subsidiary. Moreover, at Yorktown, Shop Steward Sprofera was the last to become so classified and that occurred in 1974. The result was that Bedford which had 16 full-timers at the time of its acquisition had only 10 at the time of the hearing. It follows that only the full-timers were union members, and indeed, no part-timer had ever become a member of the Union.

All schoolbus runs and other job assignments such as charter trips were assigned on the basis of bids by senior employees. A seniority list was maintained at each of the terminals, headed up in each case by the full-time employees and following in chronological order were the part-timers. It was, therefore, possible for part-timers near the top of the list to bid on runs which would eventually give them sufficient hours of employment so as to qualify pursuant to the contractual provisions. In some instances, part-timers succeeded to full-time status by virtue of the departure of a full-time driver from Respondent Company's employ. However, as noted in the case of the Bedford terminal, some full-time positions were never filled after an incumbent had left.

B. *The Alleged Supervisory Status of Certain Individuals*

At issue is the serious question of whether Joanne Sprofera, Albert Cotto, Gerald Navin, and George Martin are supervisors and agents of Respondent Company. Concededly these four individuals are shop stewards and, accordingly, agents of the Union, but the determination of various alleged unfair labor practices will often hinge on whether they are also supervisors and agents of Respondent Company. In addition, it is alleged that Martha Doddenhoff, an employee, has acted as an agent of Respondent Company. Therefore, prior to an examination of the alleged unfair labor practices, the status of these individuals should be explored.

1. Joanne Sprofera

According to Sprofera she had been employed by Respondent Company since May 1973 and has been an assistant dispatcher and a reserve driver. She stated that she started as a part-timer and became a full-time employee and a union member based on her seniority. In this latter connection, she also became shop steward at Yorktown in 1974, having been voted in by the full-time employees. Although her title is not specifically covered by the union agreement, she earns the rate of pay as well as all other benefits of the full-time drivers. In addition, it appears from the payroll records that Sprofera works considerable overtime and therefore, frequently receives more in pay than Joan Turner, the dispatcher and terminal manager who is an admitted supervisor.

Sprofera and Turner work different hours so that the office is covered by one of them throughout the day. Thus, Turner normally arrives at 5 a.m., opens the office, and works until 2 or 3 p.m. On the other hand, Sprofera starts her workday at 6:30 a.m. and works until the office closes at 5 p.m. In addition to normal dispatching duties, Sprofera on occasion does safety inspection checks and for this purpose uses a company car to follow buses, thereby checking the performance of the drivers. The car, incidentally, is used by her and taken home at the end of her workday.

As dispatcher, Sprofera mans the radio in the office, receives calls from drivers, makes calls to them relaying instructions, and provides assistance to drivers when they call in for it. Although the runs were selected by all the drivers, including both full-time and part-time drivers on the basis of seniority, it is frequently necessary for Sprofera to make changes and adjustments. Many of the drivers testified at the

hearing that they received assignments from Sprofera other than normal schoolbus runs. Thus, Sprofera made assignments to part-time drivers to clean and wash buses, move buses, start them up when needed, run errands such as picking up parts and soda, and other little necessities that had to be performed. More important Sprofera was able to make assignments on midday runs and special activities which could result in numerous additional hours to the employees who received them. Sprofera also, on delegation from Turner, signed payroll cards for overtime pay.

In addition, it appears that Sprofera on occasion reprimanded employees. Lauren Dickerson, a part-time driver testified credibly, and without contradiction, that in the spring of 1980 she missed 3 days of work and had not called in. On her return, Sprofera took her aside and said to her, ''If you do anything like that again, we're going to have to let you go.''

Turner attempted to downplay the authority and duties of Sprofera. She stated that all the assignments were of routine character which she herself had prepared beforehand and, more particularly, when she left at 3 p.m., there was nothing really for Sprofera to do except to follow prearranged instructions on assignments. I cannot credit this. Despite the fact that Turner had a radio in her car and could be reached by telephone at home, it is not entirely clear, nor is it even believable, that after a full day's work she would be waiting around to receive a call from Sprofera inquiring what to do in some emergency situation. Moreover having observed Sprofera at length during the hearing, I find that she is without doubt a ''take charge'' person and a type that would undoubtedly resolve a problem herself. It would seem then for at least a period of 2 hours and perhaps more, Sprofera was in sole charge of the Yorktown operation. In view of the fact that it is not uncommon for buses to have emergencies and schedules may be required to be changed, Sprofera was the one who performed these tasks and directed the drivers as necessary. While there is no evidence that Sprofera actually hired and fired employees, I nevertheless find, in view of the above, that on occasion she did discipline employees or at the very least was in a position where her remarks such as noted above, would be considered by the employees as warnings or discipline, and finally that she made assignments, including extra assignments, and responsibly directed the work of the drivers during regular, considerable periods of time. Accordingly, I find that Sprofera is a supervisor within the meaning of Section 2(11) of the Act. *Jay Dee Transportation*, 243 NLRB 638 (1979).

2. Al Cotto

Cotto, is both the shop steward and the foreman of the maintenance employees at Yorktown, of whom there are five. He receives $9.05 an hour which is a 45-cent premium above the contract wage scale for mechanics. He works from 7 a.m. until 6 p.m., thereby garnering considerable overtime pay, but his position is not covered by the contract. Cotto has his own personal office, telephone, and maintains personnel records which include attendance and discipline reports with respect to the five mechanics working under him. This takes up a good portion of his time so that he spends only half of the day doing mechanical or maintenance work.

Repair work is forwarded to him by Turner, the head dispatcher, based on complaint sheets turned in to her by the drivers. According to Cotto, he determines which repairs are to be done first and selects who should do them. Thus, he assigns the work to the five men each day on the basis of their skill, availability, and the need for certain jobs to be done. In addition, Cotto is authorized to write up people for their poor work performance and as an example, he referred to an employee named Michaelowski, whom he had noticed three times for not obeying instructions. Incidentally, in connection with this particular employee, a meeting regarding his problems was conducted at Yorktown with Silvanie and Navin who is the head steward. Cotto stated that he decided it would be better for Navin to be present because in this situation he was not only the shop steward but also was his boss.

Although Cotto has never fired any employees, he does make a record of their performance and sends it to Silvanie. In addition, while he does not grant wage increases, he can put in a requisition for one and his recommendations are normally followed. He cited one instance in which an employee was promoted at his request. According to his own testimony, Cotto is the ''boss'' in that department, he does the administration and assigns the work. On the basis on all the above, I find that Cotto has and does make recommendations with respect to the conditions of employment of the maintenance employees at Yorktown which are followed and, more important, he responsibly directs employees in the performance of the maintenance work at Yorktown. Accordingly, I find Cotto to be a supervisor within the meaning of the Act.

3. Gerald Navin

Navin is employed at the Ossining terminal as an assistant dispatcher, and, similar to Sprofera, as a safety inspector. In addition, he is utilized as a reserve driver but averages only two or three a.m. or p.m. runs per week. He is, of course, classified as a full-time driver, a union member, and has been the chief shop steward of the entire organization. Navin drives a company car and is entitled to free gas. He usually arrives at 5 a.m. and opens up the dispatching office and thereafter assists Booth, the dispatcher, by performing his duties and talking with the drivers over the radio. Navin also performs the function of directing the traffic in the terminal when it is blocked with buses and directs the drivers accordingly. He also has the power to initial employee timecards, particularly with respect to overtime. In view of the fact that in his capacity as chief steward, he represents, theoretically, all the drivers, he spends a good deal of his time driving from one terminal to another in connection with problems such as grievances which from time to time have come up. At the Ossining terminal there are 85 to 90 drivers and 22 mechanics. Of these only four, including Navin, are classified as full-timers and they are the sole union members.

While the record is not as clear as in the situation of Sprofero, it nevertheless appears that Navin performs work similar to that of Sprofero, with the possible exception that he is forced to spend more time than she on union business, because he is the chief steward. On the other hand, it is clear that he does this by using a company car which he takes home with him, and is also fully paid for that time. In any case, his work schedule and responsibilities at the dispatcher's office and his authority over drivers in such situations as when the yard requires unjamming and others, would result in a finding that he is a supervisor within the meaning

of the Act. On the other hand, if such conclusion is not readily ascertainable, I would find, based on his duties already discussed including his performance as safety inspector reporting on drivers, and on occasion signing a certificate for New York State on behalf of the Company, that it has placed Navin in a position from which employees could reasonably conclude that he is acting on behalf of and representing management. Accordingly Respondent Company must bear responsibility for his conduct, *Wm. Chalson Co.*, 252 NLRB 25 (1980).

4. George Martin

Martin had been employed 12 years ago as a busdriver with Respondent Company's predecessor at Bedford and continued to be so employed at that terminal. Martin has been the shop steward at Bedford for 6 years where there were currently nine union members of whom two were mechanics. Martin stated, incidentally, that before 1976 a union driver who left was replaced by one, usually by advancing a part-timer by virtue of his or her seniority. This has not occurred since Danzeisen obtained control of Bedford and as a result, the number of full-timers and the union members has declined. In connection with his stewardship, Martin stated that he has never processed a grievance on behalf of a nonunion employee or part-timer, at least prior to the 1981 agreement. The terminal manager at Bedford is Goodrow with whom Martin worked for the purpose of scheduling people on their runs. In addition, it was Martin who would decide among the full-timers as to who was to do the so-called garbage work, such as cleaning buses, and selected them as needed. Apparently the system at Bedford was that Goodrow would do most of the assigning of the nonunion drivers or part-timers, while Martin made the assignments, in his discretion, among the union drivers trying to divide the work so that one driver should not have more onerous tasks than the other. Frequently Goodrow would call him and state that he needed a driver for one purpose or another and Martin would make the selection.

While this question is not entirely free from doubt, it appears that Martin is sufficiently involved with the assignment of employees for various jobs and, in so doing, exercises independent judgment, that I find he is indeed a supervisor within the meaning of the Act. However, his position is such that employees would have the impression that in receiving orders from Martin, the latter is acting as an agent or an official of Respondent Company and accordingly I would, in any case, find him to be an agent. This is particularly noteworthy when one considers the large number of employees, both part time and full time, who were attached to the Bedford terminal.

5. Martha Doddenhoff

Doddenhoff had been employed by a predecessor of Respondent Company as a busdriver. When it took over she was offered and turned down the opportunity to become a full-time driver, and did not become a member of the Union, because she did not want to work the hours that were required for such status. At various times, particularly during negotiations for contracts such as in 1978 and 1980, Doddenhoff was elected by the part-time drivers as one of their representatives to be present at negotiations. However during the strike which occurred in January 1981, and which will be discussed in greater detail later, Doddenhoff was not informed by the other employees that the strike was going to take place and consequently she came to work, crossed the picket line, and was ready to drive her bus as usual.

General Counsel contends that Doddenhoff was, in actuality, an agent of Respondent Company basing this contention on the fact that it appeared that she and her husband had a social relationship with Danzeisen. Indeed at a meeting of part-timers which Doddenhoff, attended in November 1980 at the home of Diana Picucci, she offered to step down as a representative because some people felt she should not continue in that capacity because of her relationship with Danzeisen.

The only evidence submitted in support of General Counsel's claim is that Doddenhoff is an officer of a bank with which Danzeisen does business, and at least on one occasion the Doddenhoffs attended a social affair at which Danzeisen was present. This evidence is clearly insufficient upon which to base a finding that Doddenhoff was an agent of Respondent Company and authorized, therefore, to act on its behalf. I find, therefore, contrary to the General Counsel's claim, that Doddenhoff was merely one of the part-time employees, not a member of the Union, and not an agent of Respondent Company.

C. *Alleged Violations of Sections 8(a)(1) and 8(b)(1)(A) of the Act*

As a result of the differences in working conditions, benefits, and the inability of some of the part-timers to attain membership in the Union which they equated, correctly or incorrectly, with higher wages and other benefits, a group of approximately 35 to 40 part-time drivers at the Yorktown terminal held a meeting one evening in November at the home of Rose Stueck. According to employee witnesses, those who attended the meeting vented their feelings concerning their inability to obtain raises and their apparent exclusion from union membership. In addition, other working conditions were talked about such as sick days, medical benefits, and hospitalization. Finally the group decided to form their own association and, to that end, those present elected Helen Genco, Martha Doddenhoff, Diana Picucci, and Eileen Donabie as their representatives. It was also determined that they write a letter setting forth their demands to Danzeisen. Thereafter, a letter was written in which these part-time employees demanded a raise of $1 an hour, equal pay with the union drivers for charter work, as well as a request that Danzeisen recognize their association. The letter was signed by more than 60 part-timers and delivered to Danzeisen.

Receiving no response from Danzeisen, the part-timers at Yorktown met during the latter part of November at the home of Picucci. Once more the drivers discussed their economic problems and talked about taking some action including a slowdown, or even a strike, but no decision was made concerning any such step. In any case, after about a week, Danzeisen called a meeting of the part-timers at the dispatcher's office in Yorktown. Besides the drivers and Danzeisen, Silvanie, Navin, the chief steward, and Sprofera attended this meeting. According to employee witnesses who testified at the hearing, Danzeisen opened the meeting by acknowledging receipt of their letter at which point an employee, Lauren Dickerson, asked Danzeisen to recognize the association they

had just formed at Yorktown. He refused to recognize them or talk to their elected representatives, stating that he was unable to do this, that it would be illegal for him to do so, and that they were bound to the union contract despite the fact that they may not be members of the Union.

Eileen Donabie, who had been elected as the representative of the van drivers, asked why that group had not received a raise for a number of years. Danzeisen's reply was that they were lucky to have those jobs because he could get taxicab drivers to run the vans for less money. Furthermore, he stated that he would only negotiate raises with the Union. He also said that he could possibly lose the contract coming up with the school district and, if that happened, they would probably wind up driving for less money. Moreover in the event he was not the lowest bidder, they would all be out of jobs. According to Rose Stueck when Danzeisen was asked if they could join the Union he said they could not afford it because it would cost them $300 more and they would get nothing out of it; he would see to that. Finally the meeting ended when the employees left since Danzeisen refused to talk about or recognize any of their problems.

Danzeisen during the course of his testimony did not refer to this meeting, but Silvanie, the general manager, testified at some length regarding it. To a large degree, Silvanie confirmed the testimony of the employees who testified at the hearing, including Genco, Rescigno, Papineau, and others with respect to Danzeisen's statements that they were bound to the union contract and he could not negotiate with them apart from the Union, but that he would be glad to discuss these matters with the union representatives if they were willing. But Silvanie also agrees to some extent that Danzeisen did indeed speak of what would happen if some of the part-timers' requests were granted by him. Thus, he said if he granted a raise to the Yorktown drivers, he would have to do the same for all part-timers in the Company. This led him to a discussion of the bidding for the school contracts in the following year. According to Silvanie, Danzeisen said if the part-timers would receive a raise in pay, he would be forced to raise his bid sufficiently on the Yorktown contract, which would come up first, to pay the increased wages of part-timers, and therefore he could guarantee that he would not be the low bidder and result in loss of the contract for this garage.

I credit the testimony of the employees, who testified as indicated above, that Danzeisen, in effect told them they would lose their jobs if they continue their demands for an increase or even if they were able to obtain such increase; and in addition, replied to Donabie's query concerning the freezing of wage rates of the van drivers that they could easily be replaced by taxicab drivers. In my credibility assessment, I have considered the failure of Danzeisen to allude to this meeting at all in his testimony, and the manner in which Silvanie testified revealed that he was being very careful and selective in what he said. Nevertheless, I find he testified sufficiently to support many of the statements made by the employees as to what occurred at this particular Yorktown meeting. Accordingly, I conclude that during the course of this meeting Danzeisen threatened employees with loss of jobs should they continue their quest for increased wages and better working conditions and thereby violated Section 8(a)(1) of the Act.[2]

According to Genco, Doddenhoff informed her and the other part-time representatives that about 1 or 2 weeks later Danzeisen wanted to meet with them in Ossining. Present at this meeting were Genco, Doddenhoff, Rescigno, Donabie, Danzeisen, Silvanie, Navin, and Sprofera. The so-called representatives again asked Danzeisen for a raise and he replied that he had put in a bid for the school district and was not about to give them a raise; and when they asked for just anything, he said no, not even a nickel. Donabie told him that the part-timers were talking about a strike to which Danzeisen replied he was losing money and did not need the Yorktown yard and would close it down. Moreover, he said that they were right up front as representatives and could be fired and that the others would go back to work. Again, by threatening the part-timer representatives with discharge and closure of the Yorktown terminal should they persist in seeking a pay raise, Respondent Company further violated Section 8(a)(1) of the Act. This is basically uncontroverted as Danzeisen did not discuss this meeting at all in his testimony, and although Silvanie conceded that such meeting had been held, he did not furnish any details as to what transpired.

A similar situation prevailed at the Bedford terminal where Herman Lane, a veteran part-timer, credibly testified that as early as 1978 he questioned George Martin, the shop steward, concerning the failure of the Company to pay part-timers overtime pay for work in excess of 40 hours. Martin told him that part-timers would never collect premium pay as a matter of company policy. On another occasion he called Silvanie by telephone and asked about holiday and overtime pay and was told that there were different scales for part-time employees.

Lane called Danzeisen in the fall of 1980 and informed him that the part-timers were not satisfied with the pay differential between them and the full-timers. As a result Danzeisen came to Bedford and spoke to the part-timers in a bus. He insisted that he was not allowed to negotiate with them or make any agreements with them because the Union was the sole bargaining agent. He repeated that he could not do anything about this problem while the contract was enforced. In the meantime the part-timers at Bedford had elected a committee including Lane, Mary Ann Connor, Laverne Bell, and several others. After the visit of Danzeisen this committee elected elected Lane to be their representative and spokesman. Shortly thereafter as a result of another call by Lane to Danzeisen to tell him that the employees were not satisfied, the latter returned to Bedford and met with about 30 part-timers on one of the buses. Lane's testimony, which was corroborated by Connor and Bell, was that Danzeisen said he could not afford to pay all the benefits to the part-timers. He said that if he did, he would then have to raise his bid on the school contract and ultimately they would be working for another company at a lot less pay. As an example, Danzeisen described a situation in Connecticut where another company took over, and the drivers there are now

[2] It is noteworthy that Silvanie in testifying concerning Danzeisen's statements to the employees, emphasized and repeated that he told the part-timers he could do nothing for them absent negotiations with the Union, and then Danzeisen concluded the meeting by granting the part-timers a snow day which was eventually implemented, a classic case of bypassing the Union.

working for less money. The record does not show any denial by Danzeisen as to the substance of his remarks.

The statements made by Danzeisen are similar to those made by an employer in *Mission Tire Co.*, 208 NLRB 84 (1974). There a supervisor made the statement that the company would not be competitive or able to remain in business in the event the union ''came in'' and made the same demands on it as the union had in contacts with other companies. The Board held that his was ''merely an expression of opinion reasonably based on economic facts which is protected by Section 8(c) of the Act.'' Similarly, in *B. F. Goodrich Footwear Co.*, 201 NLRB 353 (1973), where the employer made a statement that the company would probably have to close down if the union came in and demanded higher wages, the Board held that the statement was not a threat but an opinion which was based on demonstrable facts as to the economic facts which reasonably could result if he had to pay out benefits he was unable to afford. Accordingly, I shall dismiss the complaint allegation with regard to this meeting at Bedford. See *Daniel Construction Co.*, 264 NLRB 569 (1982).

Florence Parsons, a part-timer, testified that in November 1980, after the meetings with Danzeisen, she was called one afternoon to the office by Joanne Sprofera. The latter told her ''to stay out of the labor problem, forget about it,'' not to get involved with them. Parsons testified credibly whereas Sprofera merely denied generally that she had threatened any employee, a statement I cannot credit based on her demeanor and other conduct. Accordingly I find that Sprofera, a supervisor, specifically called in Parsons and told her to stay of the labor problems, and that such action has a tendency to coerce employees and prevent them from engaging in union or other protected concerted activities in violation of Section 8(a)(1) of the Act. By the same conduct Sprofera, as shop steward and agent of the Union, caused Respondent Union to restrain and coerce Parsons in the exercise of her Section 7 rights in violation of Section 8(b)(1)(A) of the Act.

Continuing with the conduct of Sprofera, Mary Ann Rescigno, a part-time driver, testified to an incident which occurred on January 6. She stated that during the afternoon there had been a snow forecast, and Sprofera was calling the busdrivers on the radio, but the part-timers were not answering because they knew the call was for drivers to assist in the chaining of buses. This process called for a few of the drivers to volunteer to bring the buses in to be chained, a task performed by the mechanics. This work had always been voluntary in the past and presumably the part-timer, nonunion drivers were acting together in refusing to respond to Sprofera's call. Rescigno said that after finishing her run, she went upstairs to the drivers' room and Sprofera, obviously upset, shoved her and said, ''Why didn't you answer the radio, you guinea bastard.'' Rescigno told Sprofera she was not staying there to chain the buses, and then punched out and left. I credit Rescigno as against Sprofera's general statement that she did not assault any employees, for the reasons already set forth. Accordingly I find that Respondent Company further violated Section 8(a)(1) by Sprofera's conduct in shoving Rescigno, because the latter had engaged with the other part-timer, nonunion drivers in refusing to respond to her call for volunteers to chain buses. By the same token, Respondent Union shoulders responsibility for the actions of its steward and agent, Sprofera, and therefore violated Section 8(b)(1)(A) of the Act.

Continuing with alleged independent violations of Section 8(a)(1), it is undisputed that Respondent Company maintained the following rule which is published in its employee handbook:

> Destructive Criticism: Employees shall not make any statements while on duty or on company property, whether buses, terminals, garages or other property, to passengers or prospective passengers, or in the presence of passengers or prospective passengers, so that they could hear same, concerning the matter of wages, hours or working conditions, company policy or company property, or the condition of buses, or concerning orders given by superiors.

General Counsel contends that the rule is unlawful on its face because it is drawn so broadly, that it encompasses a ban on employee discussion on wages, hours, and working conditions, on employees' nonworking time. As General Counsel points out in his brief, a ban which prohibits employees from discussing working conditions during their own time, on company property, is presumptively unlawful. *Our Way, Inc.*, 268 NLRB 394 (1983). In order to overcome the presumption of invalidity an employer can show that its rule was communicated to employees or applied in such a way as to make it clear that employees are free to solicit on their own time. *Essex International*, 211 NLRB 749 (1974).

Special rules have been carved out for certain industries, such as retail establishments, restaurants, hotels, and health care facilities, where ''special circumstances'' exist. *Times Publishing Co.*, 605 F.2d 847 (5th Cir. 1979). Thus, the Board has allowed prohibitions of solicitation in all selling areas of retail stores by employees whether or not they are on duty. *J. C. Penney Co.*, 266 NLRB 1223 (1983); *May Department Store*, 59 NLRB 976 (1944), modified 154 F.2d 533 (8th Cir. 1946), cert. denied 329 U.S. 725 (1946). Similarly, the Board, with Supreme Court approval, has allowed employers to restrict solicitation in certain ''patient care areas'' of health care facilities. *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). These exceptions to the *Our Way* and *Essex* presumptions, however, are limited to the industries for which they are created. In the absence of a specific showing that a particular rule is necessary to maintain order and discipline, an employer in other industries must restrict its no-solicitation rules to employees' working time.[3] *Peyton Packing Co.*, 49 NLRB 828 (1943).

In the instant case the rule prohibits conduct which would encompass discussions of wages, hours, and working conditions. The rule additionally applies to any statements made while ''on duty'' or on ''company premises.'' Accordingly, employees under this rule can be disciplined for comments made on their own time, in violation of the principles laid down in *Essex*, supra, and *Our Way*, supra. Since Respondent has not adduced evidence that the rule was conveyed to employees or applied in such a way as to cure the defect, nor

[3] Where distribution of literature is involved the employer is permitted to ban soliciting in all working areas of the plant, regardless of whether the solicitation takes place on working time. *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962).

has it shown that the Board rule was necessary for the maintenance of production or discipline, I conclude it violates Section 8(a)(1) of the Act.

Marie Anne Conner and LaVerne Bell, two part-time drivers at Bedford, testified, without contradiction, that on two separate occasions they each asked Martin to show them a copy of the collective-bargaining agreement and that they were refused. Conner testified that she asked Martin to show her the contract. He replied that he would answer any of her questions, but he was under orders by Danzeisen not to show any employees the contract. Bell stated that after the meeting with Danzeisen in which he said they were represented by the Union, she asked Martin who told her he was under orders not to show the contract. Additionally, Martin told Bell that the contract had been posted on the bulletin board in the garage until he had been ordered to take it down. Martin did not tell Bell who had given him these instructions.

General Counsel contends that Martin, in his capacity as shop steward, refused to show copies of the collective-bargaining agreement to bargaining unit employees in violation of Section 8(b)(1)(A) of the Act. Indeed, the Board has held that a union violates the Act when it refuses to show to employees the collective-bargaining agreement which determines their rights. *Law Enforcement & Security Officers, Local 40B (South Jersey Detective)*, 260 NLRB 419 (1982). As Respondent Union does not dispute that Martin, its admitted steward and agent, withheld the agreement from two bargaining-unit employees, I conclude that it violated the Act as alleged.

D. *The Alleged Violations of Section 8(a)(2) of the Act*

The complaint alleges that by permitting supervisors to function as such and, at the same time, serve in the capacity of shop stewards and agents of Respondent Union, Respondent Company thereby violated Section 8(a)(2) of the Act. I have already found Sprofera, Cotto, Navin, and Martin are supervisors and/or agents within the meaning of the Act but it is necessary also to describe how they acted and functioned as shop stewards.

First it must be noted that these individuals were not the routine type of stewards found in a small plant. They were in fact cloaked by the Union with a good deal of authority and responsibility. Thus it is uncontroverted that the stewards attended contract negotiation sessions. Moreover, Respondent Union's secretary-treasurer, Arthur Revelese, testified that he asked the stewards to prepare and forward to him demands for bargaining and negotiations. He also stated that grievance processing was handled basically by the stewards, and only in rare situations when the grievance could not be resolved did it come to his office.

The record is replete with testimony by part-timers who attempted to join the Union and their only contact was with the steward at the particular terminal. Thus Genco stated that as far back as 1976, she asked Sprofera which Teamsters Local represented the employees and was told it was none of her business. She also asked Sprofera in 1977 about becoming a union member and was told she was not working enough hours. Later that year when she was working more hours, she again asked Sprofera, who told her that there were no new members going into the Union. Herman Lane, a part-timer at Bedford, testified that in 1976 he asked Martin, the shop steward at the locality, why some of the nonunion drivers had not been made full-timers and Martin replied that there was a quota on the number of full-timers. Camille Papineau, a part-timer, stated that in 1979 she had asked Sprofera if she could join the Union because she needed medical coverage, and was told she could not afford it. Other part-time employees had similar experiences. I credit these employees with respect to their attempts to become members of the Union, despite half-hearted denials by Sprofera and Revellese that they never refused membership to part-time employee. Revellese, himself, testified that no part-timer had ever been admitted to union membership.

Although the Board has held that it is not a per se violation for a supervisor to belong to a union or to participate in union affairs, it has also found that, ''employees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests.'' *Nassau & Suffolk Contractors Assn.*, 118 NLRB 174, 187 (1957). Thus supervisory involvement in union affairs becomes unlawful when it produces a demonstrable conflict of interest. See *Russ Togs, Inc.*, 253 NLRB 767 (1980), or where a conflict of interest is inherent in the dual role. See *Three Hundred South Grand Co.*, 257 NLRB 1397 (1981). Where such a conflict exists, the employer, in order to avoid liability under Section 8(a)(1) and (2), is under a duty to refuse to deal with the supervisor-union representative in his union role. *Nassau & Suffolk Contractors*, supra at 187.

The Board has found a conflict of interests, where high-level supervisors vote in internal union elections, see *Schwenk, Inc.*, 229 NLRB 640 (1970); where supervisors participate in contract negotiations on behalf of the Union, *Nassau & Suffolk*, supra at 182; where a supervisor served as union steward who handled grievances and participated in negotiations, *Dock Warehousing & Bottling Centers*, 169 NLRB 708, 714 (1968); and where the steward's functions encompassed a wide range of duties, *ITT Arctic Services*, 238 NLRB 116 (1978). On the other hand, the Board found no violation where a temporary supervisor in the construction industry also functioned as steward with limited responsibility, *Beech Electric Co.*, 174 NLRB 210 (1969); and found no violation where a supervisor-steward with a limited responsibility of handling grievances relating to wages was recognized by the employer, *Allied Chemical Corp.*, 175 NLRB 974 (1969).

The instant case clearly falls within the parameters set forth in the cases cited in which the Board found such conflict of interest which violated the Act. I have found Sprofera, Cotto, Navin, and Martin to be supervisors within the meaning of the Act, and it is conceded that they also acted as union stewards. All were permanently employed, were involved in all aspects of grievance handling as well as communications between bargaining unit employees and the Union, administered the collective-bargaining agreement, and attended and participated in contract negotiations. Indeed, as described above in connection with attempts by part-timers to join the Union, these supervisor-stewards helped maintain a quota of union full-time employees and thereby kept wage scales lower for nonunion employees. In a similar case, it was found that even a low-level supervisor-steward who engaged in such conduct was at the very center of a conflict of interest, and the employer thereby violated Section 8(a)(2) of the Act by dealing with him as a steward. *Narragansett*

Restaurant Corp., 243 NLRB 124, 131 (1979). Accordingly, I find that Respondent Company by dealing with the above-named shop stewards who were also supervisors or agents violated Section 8(a)(1) and (2) of the Act.

The alleged violation of Sections 8(a)(1), (2), and (3) by denying benefits to employees who are nonmembers of the Union

It has been shown that employees Genco, Maryann Rescigno, Camille Papineau, and Parsons, at Yorktown, approached Sprofera at various times requesting union membership. Although Sprofera denied refusing or discouraging them, I do not credit her. Similarly Revellese, the union official, denied that he refused membership to part-timers, but it is clear that stewards shielded him from that chore. On the other hand, George Martin, the steward at Bedford, replied to a request from Herman Lane, in a more candid manner by responding that a quota had been established. In any case, the bottom line is that none of the part-timers in the time period involved herein ever became members of the Union and the number of union members remained static at Yorktown, and actually declined at Bedford since departing members at that terminal were not replaced.

Although the collective-bargaining agreement provided a formula whereby part-timers could attain full-time status, its application was rare in view of this system of maintaining a small quota in that category. The contract in effect from 1978 through 1981 defined a full-time employee as one whose daily trips consisted of 7 hours constantly during the normal workday. Nevertheless payroll records reveal over 30 drivers, part-timer and nonunion, averaged more than 35 hours per week during periods between 1980 and 1981, and some even averaged more than 40 hours a week during certain intervals. None of these drivers were reclassified so as to attain full-time status. Since such status is subject to the union-security clause of the contract, those employees would have also become members of the Union.

Clearly the contract provision as well as the union-security clause was not enforced either by Respondent Company or the Union. Again in his testimony, Martin stated that not only Lane had worked around 35 hours and sometimes more, but also estimated about 10 others had exceeded the 35-hour figure. Martin further testified that he never asked any of these part-time drivers to become union members, nor did Chief Steward Navin ever ask him to solicit new members, nor was he asked to check the number of hours worked by part-timers at Bedford.

Both Danzeisen and Silvanie testified that seniority was the sole factor by which a driver would be converted from part-time to full-time status, provided of course they had completed the hourly requirements set forth in the contract. While it is uncontroverted that seniority among the part-timers was the basis for which each of them could bid for runs or assignments, it was of no avail to the part-timer who had worked more than 35 hours in a week over a period of time, if there were no ''vacancy'' in the full-time ranks. For example, at Yorktown, it has been shown that a substantial number of drivers had fulfilled the hourly requirements as a result of their seniority among part-timers which enabled them to select their runs, yet the full-time ranks were closed to them. Union membership was denied to them because the union-security clause applied to ''all new regular full-time employees . . . .'' Moreover, the Union did nothing to encourage their membership on any basis, but rather, as has been already stated, applicants were discouraged, to put it mildly, by the steward-supervisors who were approached.

Finally at the risk of reiteration at this point, it must be stressed that there was a wide disparity in wages, and other benefits such as health, welfare, and pension plan, vacation pay, sick leave, and other conditions as between the part-timers and the full-timers. Most of these benefits were not available at all to part-timers.

Based on the facts as set forth above, I find that Respondents, Company and Union, have engaged in a pattern of conduct whereby they utilized the contractual provisions relating to full-time and part-time employment as a cover for treating employees disparately, and by virtue of the shop steward-supervisory conflict, were enabled to prevent employees from achieving union membership and full-timer status even if part-timers fulfilled the requirements. Indeed, to the vast majority of part-timers, union membership became equivalent to the attainment of full-timer classification with its concomitant higher wages and other benefits under the contract. While this view may be simplistic, it was the result of their unsophisticated observation. In any event the system thwarted their goals.

While employers and unions may lawfully maintain collective-bargaining agreements which provide for different wages and benefits for various segments of the bargaining unit (see *S. Fishman, Inc.*, 245 NLRB 179 (1979)), they violate Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, where these distinctions are based on union membership. *Prestige Bedding*, 212 NLRB 690 (1974). The rationale for this holding was long ago articulated by the Board in *Rockaway News Supply Co.*, 94 NLRB 1056, 1059 (1951), when it stated that ''limiting the payment of substantial sums to employees who were Union members would certainly constitute a strong inducement to them to retain their membership, and to nonmembers to seek Union membership.'' In that case the Board also noted that several employees had, in fact, attempted to join the union but had been rebuffed. The Board found therein a violation of Section 8(a)(3) on the basis of unlawful discrimination and further, that the employer's maintenance of a contract that favored union members unlawfully assisted the union in violation of Section 8(a)(2) of the Act. Moreover, this rule applies even in cases wherein the collective-bargaining agreement is lawful on its face, but is unlawfully applied to the benefit of union members. *Kaufman DeDell Printing*, 251 NLRB 78 (1980). Finally this disparate wage treatment based solely on union membership is inherently conducive to increased desire to become union members, in violation of Section 8(a)(3) and the existence of such discrimination is enough to constitute the illegality. *Radio Officers v. NLRB*, 347 U.S. 17, 45–47 (1954); *Lewis Mittman, Inc.*, 245 NLRB 450 (1975).[4]

[4] I find no merit in Respondent Company's contention, supported by evidence, that its conduct was motivated by industry practice and the desire to remain competitive, and that General Counsel failed to respond with evidence of unlawful motive. In this connection, Respondent Company's reliance on *NLRB v. Great Dane Trailers*, 388 U.S. 26, 36 (1967), is misplaced, as the Supreme Court held that ''even if the Employer does come forward with counterexplanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself . . . .'' I have drawn such inference from the pattern of conduct of both Respondents through their officials, supervisors, and shop stewards.

Having found that the Respondent Company violated Section 8(a)(1), (2), and (3) of the Act, I also find that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by its cooperation and participation in the disparate distribution of wages and benefits based on union membership. This is so because, by its conduct, the Union has caused the Company to discriminate in order to encourage union membership, and also restrains employees in their decision to refrain from union activity. The unfair labor practices are compounded if, in addition to maintaining wage and benefit schedules based on union membership, the Union has also restricted membership by maintaining quotas.

In this connection *Narragansett Restaurant Corp.*, supra, presented a similar situation. In that case, the union maintained a quota of 35 members who were paid at higher wage scales and on whose behalf the employer made health and welfare contributions. Although respondent therein contended that the nonunion employees were ''casuals'' and the union employees were called ''regulars,'' it was found that such distinction was ''nebulous and in any event unsupported by substantial evidence.'' It is noted that in the instant case the part-timers performed the same functions as the full-timers and even though the agreement provided a formula for conversion of part-timers to full-timers, it was not enforced as Respondent Company's records reveal that 20 employees who had attained the hours of work required were not converted from part-time to full-time status. In addition, employees who sought to become union members were rebuffed by the stewards (supervisors) from doing so. Despite Respondent Union's contention to the contrary, employees are not required to seek out higher union officials after being summarily rejected by the steward who was their only contact and who was appointed by the responsible union official, and endowed with a wide range of union duties and responsibilities. See *Narragansett Restaurant Corp.*, supra.

Finally there is clear evidence of the studious attempts by both Respondents to unlawfully discriminate against the part-time employees by virtue of two provisions in the 1978–1981 contract. Thus, a proviso in the eligibility requirements for participation in the pension fund states that an employee ''shall have completed three months of service with the Company from the date he becomes a member of the Union.'' While it may be lawful to provide different benefits to part-time employees than to full-time employees, this difference is based purely on union membership. Such proviso is invalid on its face, because an employee cannot obtain the benefit of a pension plan until he becomes a member of the union, a benefit therefore dependent on union membership. Accordingly by providing this type of pension plan and maintaining it, Respondents have violated Section 8(a)(1), (2), and (3) and Section 8(b)(2) of the Act, respectively.

The contract also provided for a supplemental unemployment benefit fund to which Respondent Company agreed to pay monthly 25 cents an hour for each hour worked ''by each employee covered by this agreement.'' When Respondent Company did not make payments to this fund, Respondent Union instituted a lawsuit to enforce the agreement. This litigation was settled on the basis of lump-sum payments made by Respondent Company to only full-time, union member employees. Nothing was done for the part-time employees, who were not members of the Union, despite the clear language of the contract that this unemployment benefit fund was for all employees covered by the collective-bargaining agreement. As a result of such discriminatory, unlawful conduct, both Respondents violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively.

E. *The Strike*

1. Negotiations

Negotiations for a new collective-bargaining agreement began in December 1980, despite the expiration date of the current agreement in July 1981. Presumably Danzeisen called for early bargaining as a result of his meetings with the Yorktown and Bedford employees the previous month. Indeed, he suggested that Doddenhoff and Lane from Yorktown and Bedford, who were elected representatives of the part-timers at those locations, attend the sessions. These two in turn invited fellow representatives who had been elected at the two locations. The representatives from Yorktown were driven to the meetings by Sprofero in the safety car of Respondent Company. At the second meeting Donabie, one of the Yorktown representatives, was able to inform union counsel that the part-timers were also trying to get a raise, inasmuch as the previous meeting had been taken up with discussions of benefits pertaining only to full-timer union members. Union counsel then arranged to talk to the part-timer representatives separately. Genco stated she then informed him that there were a considerable number of drivers at Yorktown who were not in the Union and that she, as well as others, had been working more than 36 hours a week, actually 38 to 40. The union attorney said he was not aware this was going on, and asked whether they would be willing to pay union dues of 5 or 10 cents an hour if he were to obtain a separate agreement for them with a raise of perhaps 75 cents. Genco replied that she thought they would but would ask the other drivers. She emphasized that they needed a raise, or something. At the resumption of negotiations, counsel suggested to Danzeisen a separate contract and a raise for part-timers. The latter said that he had to be kidding, he would give them nothing, nor would he even discuss the nonunion, part-timers at the meeting. However union counsel persisted and Danzeisen left with Silvanie for a few minutes, then returned and offered a 10-cent raise for the part-timers, effective in April 1981. The Yorktown representatives presented this proposal at a meeting of the part-timers and the result was a vote against Danzeisen's offer.

There ensued a lull in the events because of the 2-week Christmas vacation. However on January 6, 1981, 1 day after the drivers returned to work, there was the incident, as discussed above, of the drivers refusal to volunteer to chain buses. The following day, schools were closed because of a snowfall. The drivers then returned on Wednesday, January 7, and noticed that buses were chained on their arrival. According to Rescigno and Genco, there was no longer any snow and buses, therefore, were not able to leave the yard, since chained buses could only be driven when snow was on the ground. Sprofera ordered the drivers to unchain the buses in the yard, which is covered with grease and oil. Although they performed this task, the drivers (part-timers) were very upset. That evening a number of them met at Rosemarie Steuck's house and discussed striking on Friday, January 9. After talking about subjects such as the disparity in pay scale between union and nonunion employees, their belief that

Sprofera was acting strictly as a supervisor and not really doing anything for them as shop steward, and the recent incident with the bus chains, it was decided to make up some strike signs for the next day.

2. The strike and ensuing alleged unfair labor practices

The following day, January 9, the part-timers at Yorktown commenced picketing. Genco estimated that by approximately 7:50 a.m. there were 44 to 50 drivers on the picket line. Of course not all of the part-timers joined, as for example Doddenhoff reported and asked what it was all about and then walked into the office, as did Donabie; and other employees merely went home. Mechanics went into work and the full-time drivers, all union members, also reported to work. However the buses did not run that day, and the strike was effective enough to cause Respondent Company to halt operations at Yorktown.

Prior to a discussion of the events that occurred while the employees were on the picket lines and the alleged unfair labor practices during that activity, it may be helpful to determine the nature of the strike and the status of the strikers. The complaint alleges that the strike and picketing was caused and prolonged by reason of the unfair labor practices of Respondent Company. On the other hand, Respondent Company asserts that the strike was unprotected as being in violation of the no-strike provision contained in the collective-bargaining agreement. The agreement provided that ''there shall be no strike or lockout or any job action of any kind taken by any employee, under the provisions of this agreement without the express prior written consent of the secretary-treasurer and business manager of the Union. Employees who engage in unauthorized strike activity or unauthorized job action shall be subject to immediate discharge, without recourse.'' The Supreme Court has long held that a waiver of this type does not include strikes against unfair labor practices which interfered with employees' free choice of a bargaining representative. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Of course the unfair labor practices must be serious and ''destructive of the foundation on which collective-bargaining must rest.''

In the instant case, I have found that Respondents Company and Union had engaged in what must be characterized as ''serious'' unfair labor practices by virtue of their maintaining, under the guise of unit classifications, a system which not only successfully prevented part-time employees from obtaining full-time status even under the conditions set forth in the contract, but also prevented them from becoming members of the Union and receiving the additional benefits which flowed from such membership and full-time status. This system, enforced by supervisors who are also shop stewards, permeated the entire employee-employer union relationships and has ''thereby destroyed the foundation of stable collective-bargaining,'' so that ''an ordinary no-strike clause does not constitute a legitimate and substantial business reason that justifies the discharge of employees who strike in response to serious unfair labor practices.'' *Servair, Inc.*, 265 NLRB 181(1982).

In the instant case, the no-strike clause was not coupled with contractual provisions for grievance and arbitration machinery, an issue dealt with by the Court in *Mastro Plastics*, as well as the Board in *Servair*, supra. However even if the contract provided for arbitration, Respondents could not plead the availability of such procedures as a defense to the contention that the employees were engaged in an unfair labor strike. The nature of the violations of Sections 8(a)(2) and 8(b)(1)(A) and (2) of the Act found herein, would preclude deferral to any arbitration in view of the clear conflict of interest between the employees and the Union which would represent them in an arbitration proceeding. *Aristo Foods*, 198 NLRB 543 (1972).

Accordingly, I find in the circumstances described above that the strike engaged in by the employees of Respondent Company was an unfair labor practice strike. In reaching this conclusion, in addition to the reasons already set forth, I have also considered that the testimony of employees who were engaged in such strike may indicate that their reasons for striking were basically economic such as the desire to obtain higher wages and other benefits not available to them as part-timers. However the Board, while considering the testimony and characterizations by employees of their reasons for striking, has not always found them literally to be dispositive. See *Brooks, Inc.*, 228 NLRB 1365, 1367 (1977). In that case the Board indicated it was not necessary for employees, in voting to strike, to do so consciously and specifically in response to certain unfair labor practices. It emphasized that the important thing is what caused the strike in whole or in part and not the employees' conscious reasons for going on strike. Thus in this case, the overhanging atmosphere of the part-time employees' failure to attain economic gains, caused by the Respondents' unfair labor practices, was the underlying cause of the strike herein, which in turn were vocalized by the part-timers' demands for increased wages and other benefits and conditions of employment.

Returning now to events that occurred on January 9 and thereafter during the strike and picketing, the complaint alleges that Respondent Company engaged in unlawful surveillance of the employees' activities while picketing. The testimony is uncontroverted that during the morning of January 9, Joanne Sprofera came out of the Yorktown terminal and wrote on a pad the names of the employees who were picketing. In addition Sprofera entered a van and wrote down the names of the occupants who included Parsons, Papineau, Dickerson, and Rescigno. Sprofera conceded engaging in this activity but at one point in her testimony explained that she was writing down names so as to determine which drivers would be available to operate the buses. At another point, Sprofera conceded that she did not know the reason for writing down the names of the strikers. In any case, I do not lend credence to her explanation since her alleged purpose would be more simply attained if she noted the names of employees who passed through the picket line and determined their availability for work. The Board has found that the taking of notes by a company representative for which no proper explanation is offered, constitutes illegal surveillance, in violation of Section 8(a)(1) of the Act and I so find with respect to this incident. *Crown Cork & Seal Co.*, 254 NLRB 1340 (1981). Such conduct creates in the minds of employees the impression that their names were being noted in a manner useful for later discrimination. *J. P. Stevens & Co.*, 247 NLRB 420, 434 (1980).[5]

[5] Respondent Company would still have violated Sec. 8(a)(1) even if Sprofera were found not to be a supervisor as it is clear that she engaged in this type of surveillance on orders from her superiors.

By the conduct of Sprofera, its shop steward, in keeping these activities of the employees under surveillance, Respondent Union violated Section 8(b)(1)(A) of the Act. Secretary-Treasurer Revellese testified that the Union had not authorized the strike, and indicated that, in his opinion, Respondent Company could discharge those and moreover, the Union could not represent them. Indeed he stated that he did not communicate with the Company as to the strike, and did not demand that the employees be returned to work because they were on a wildcat, and that they had done something without authorization and there was no way he could represent them. In any case, since it is clear that the employees involved regarded Sprofera as their steward, this conduct of writing their names on a pad would certainly lead them to believe that the Union would take some action against them or at the very least, fail to represent them. Accordingly I find that, through Sprofera's conduct, Respondent Union violated Section 8(b)(1)(A) of the Act.

While writing down the names of the striking employees, Sprofera was asked by Genco what she was doing. Sprofera replied, ''[W]hat's it to you, you're fired.'' She went on to say they were all going to be fired before the day is over and the employees were going to regret their actions. Later when Sprofera was writing down the names of the 15 employees in the van, Rescigno also asked her what she was doing and was told that she was taking her name down because she was fired. This is confirmed by Papineau who, in addition, stated that Sprofera asked her to look out the window and name all the drivers who were picketing, which Papineau refused to do. Florence Parsons also testified to seeing Sprofera write names and heard an employee ask her if this meant they were fired, and Sprofera conceded telling them to go back to work because they could be fired. In addition she informed them that Revellese believed their strike was illegal and they could be fired. I find, based on her own admissions, Sprofera's urging employees to return to work or they could be fired constituted a threat of discharge if they continued to engage in their picketing and strike activity, and thereby Respondent Company violated Section 8(a)(1) of the Act. Moreover in her role as shop steward, her reporting the opinion of Revellese that they were engaged in an illegal strike, also constitued a threat and thereby Respondent Union violated Section 8(b)(1)(A) of the Act.

Another incident on the first day of picketing involved Al Cotto, found to be a supervisor and shop steward in maintenance. He testified that on that day, he spoke to Tom Girling, a part-time employee, and advised him it was foolish to go on strike. He further said he also spoke to Revellese that day by telephone and was informed that if the strikers did not withdraw, they would automatically be fired because it was a wildcat strike which violated the contract. Cotto stated he repeated Revellese's statement to Girling and Kriner, another employee, word for word. Once more this constitutes a threat to employees that they would ultimately be fired for continuing to engage in their protected activity of striking and picketing. By this conduct Respondent Company and Union, respectively, violated Sections 8(a)(1) and 8(b)(1)(A) of the Act.

During the afternoon of January 9, while the part-timers were picketing at Yorktown, one of the part-time employees who had crossed the picket line came out and informed the pickets that Danzeisen wanted to see five of them. They were told he did not want Genco but did ask to see Rescigno, Prescott, Hughes, Parsons, and Pucucci. These five went to the drivers' room and met Danzeisen who was there with Silvanie, Sprofera, Turner, Doddenhoff, Anderson, and Navin.

Danzeisen insisted he was not giving them anything except the 10-cent raise in April and they could stay out until the cows come home. Danzeisen said that he was going to fire six people but did not name anyone. Moreover, Danzeisen said that everybody had quit. This is confirmed by the testimony of Chief Steward Supervisor Navin to the effect that Danzeisen told the part-time employees that those who went on strike had quit their jobs. Indeed, Navin stated that this was his own opinion as well.

The five strikers left the office, returned to the picket line, and delivered Danzeisen's message to the others. It being late in the afternoon, the strikers left the picket line and about nine of them including Genco, Rescigno, Pucucci, and Papineau went to Rose Steuck's house. Shortly thereafter, they received a phone call from John Meyers who said that Danzeisen wanted all the drivers to return to Vanguard to hear a proposal, so they went back. Silvanie, as spokesman for Danzeisen, stated that as far as they were concerned, the strikers had all quit their jobs and that 18 of them could return to work but would lose their seniority which would be restored the following September. In addition four of the strikers, naming Pucucci, Genco, Papineau, and Rescigno, would be suspended for 1 month, after which they could return, but without their seniority. When asked if that was the proposal, Silvanie said that was it. The strikers then left. The narration of these two meetings conducted by Respondent Company is uncontroverted.

I find that by telling the strikers that they were considered to have quit, Danzeisen's conduct was tantamount to discharging them. The Board has held that it is not necessary for an employer to ''use formal words of firing,'' but ''it is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated.'' *Rideway Trucking Co.*, 243 NLRB 1048 (1979). I find, therefore, that Respondent violated Section 8(a)(1) and (3) by discharging the strikers who had been engaged in protected concerted activity.

Moreover by later offering the strikers reinstatement with loss of seniority, Respondent Company further violated Section 8(a)(3) inasmuch as discharged unfair labor strikers were entitled to unconditional reinstatement to their former positions. In this connection it is noted by letter dated February 24, 1981, Respondent Company wrote to most of the strikers that they were reinstated with full seniority. However Silvanie testified that a number of strikers were not reinstated and were indeed discharged because Respondent Company considered them to be responsible for the strike action on January 9 and other disruptions.[6]

Finally in connection with reinstatement of strikers, Respondent Company required employees desirous of reinstatement to sign a stipulation of discontinuance of certain litigation which had been instituted by Respondent Company. Although that matter will be more fully discussed subsequently, it will suffice at this point to note that such stipulation con-

[6] Among this latter group Silvanie named Genco, Rescigno, Papineau, Steuck, Parsons, Dickerson, and Hughes.

tained provisions binding the employee to refrain from activities from which he had been temporarily restrained by court order, that the employee will also adhere to the collective-bargaining agreement, and that the reinstatement would take the form of rehire as a new employee effective January 13, 1981. Of course such conditional reinstatement of unfair labor practice strikers constitutes a further violation of Section 8(a)(1) and (3) of the Act. The letters dated February 24, 1981, sent to the affected employees released them from the provisions of this stipulation. Nevertheless from January 13 to February 24 it was in effect.

3. Additional threats during the strike

Lauren Dickerson testified that on January 10, a Saturday, she received a call from Yorktown Manager Turner who asked whether she would be coming to work on Monday. Dickerson replied that she was available but would not cross a picket line. When Turner pressed her on this, Dickerson said she could not say definitely whether she would work but she would not cross a picket line. Turner then said that she ought to think about her daughter and act responsibly, and moreover, there would be no more room for her in the carpool she shared with Al Brown, a supervisor. Dickerson testified she then heard Doddenhoff's voice on the line who said that she had thought Dickerson was willing to work within the system. The latter replied that they had gone a long time without an answer from Danzeisen and repeated that she would not cross the picket line. Needless to say, Dickerson was back on the picket line on Monday. Mary Kennedy, a part-time driver, testified that on January 10 she also received a call from Doddenhoff who asked if she was coming back on Monday and she replied that she would if there were no pickets. Doddenhoff told her that if she did not come back to work on Monday she could be fired, or if she did come back after Monday, she would lose seniority.

By the conduct of Turner and Doddenhoff, I find that Respondent Company further violated Section 8(a)(1) of the Act by threatening discharge, loss of seniority, and in Dickerson's case, threatening loss of the benefit of her carpool, unless they abandon their strike. With regard to my prior finding that Doddenhoff is neither a supervisor nor agent of Respondent Company, I find, nevertheless, that the telephone calls made on Saturday in conjunction with Turner, were undoubtedly at the behest of management and, therefore, Respondent Company is responsible for Doddenhoff's remarks. The testimony of Dickerson and Kennedy is uncontroverted as both Turner and Doddenhoff testified at the hearing but did not allude to the matters of these phone calls.

F. *Respondent Company's Lawsuit*

1. Facts

It is alleged that Respondent Company violated the Act by instituting and prosecuting a lawsuit in a state court against 24 of the part-time, nonunion drivers. The facts as to this aspect are essentially uncontroverted. On January 9, 1981, the first day of the strike and picketing, Respondent Company instituted a suit in the Supreme Court, State of New York and obtained a temporary restraining order against the named defendants. Basically the order enjoined the strikers from picketing, displaying signs and other materials relating to a labor dispute, molesting or interfering with employees or representatives of Respondent Company, damaging its property, or interfering with operation of the schoolbuses. In addition, a summons and complaint was served which, among other items of relief, requested damages of $500,000 from each of the employees names as defendants in the action. Some of the employees were served with the restraining orders on Friday night, January 9, and others were served on the picket line on January 12. Service was made at that time by an employee of Respondent Company accompanied by Sprofera who identified the pickets for him. Except for the strike leaders, Genco, Rescigno, et al., named above, the employees who were served also received a letter which set forth that they were being sued for $500,000, but offered them reinstatement to their jobs, indicating that they would then be treated as newly hired employees. The so-called ringleaders also received a letter but it did not contain the reinstatement offer. At this point, January 12, picketing ceased. Nevertheless, Respondent Company served Genco, Papineau, Dickerson, Hughes, Rescigno, Steuck, and Puccucci with a show-cause order to hold them in contempt of the original restraining order.

On January 15, the seven employees appeared in court and were warned by the judge that they were being sued for $500,000, and he advised that they get an attorney. He then continued the restraining order and adjourned the case until January 23. At the same time Respondent Company withdrew the complaint against the other named employees. The employees reappeared in court on January 23, this time represented by counsel, but Respondent Company through its attorney moved for dismissal of the case which was granted.

In the meantime, the employees who were returning to work were directed to sign a stipulation of discontinuance, referred to above, providing among other things, that they would be rehired on probation with loss of seniority until September 1981. This stipulation was countermanded by a letter to these employees dated February 24, in which Respondent Company released them from the provisions of the stipulation and restored their seniority.

2. Analysis

The Board has long held that ''the making of a threat by an employer to resort to the civil courts as a tactic calculated to restrain employees in exercise of their Section 7 rights'' violates Section 8(a)(1) of the Act. *Clyde Taylor Co.*, 127 NLRB 103, 108 (1960). In that case the Board found that an employer violated Section 8(a)(1) by threatening an employee, who filed a charge with the Board, with a libel suit. However, while establishing a prohibition against threatening employees with lawsuits in order to restrain their protected activity, the Board also held in *Clyde Taylor* that seeking an injunction in civil court was not a violation, acknowledging the right of all persons to litigate their claims in civil court. This latter policy was somewhat relaxed by the Board in *Power Systems*, 239 NLRB 445 (1978), enf. denied 601 F.2d 936 (7th Cir. 1979). In that case the Board held that a lawsuit which has as its purpose ''the unlawful objective of penalizing an employee for filing a charge with the Board and depriving him of and discouraging employees from seeking access to the Board's process,'' violated Section 8(a)(1) and (4) of the Act. Thus the key to determine whether Respondent violated the Act by bringing a civil suit was its motiva-

tion. See, e.g., *United Credit Bureau of America*, 242 NLRB 921 (1979), enfd. 643 F.2d 1017 (4th Cir. 1981).

More recently, however, the Supreme Court found in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983), that the prosecution of a civil lawsuit violates the Act where both of the following conditions are met: (a) the lawsuit is used by the employer for retaliatory or coercive purposes and (b) where the lawsuit is without merit.

The latter requirement is, of course, most easily met where the lawsuit in the state court has been concluded and the plaintiff therein lost. In the instant case, however, the lawsuit was withdrawn by Respondent Company. The Supreme Court in *Bill Johnson* (461 U.S. at 747) appears to have dealt with this matter as it stated:

> If judgment goes against the employer in the state court . . . or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to ad judicate the § 8(a)(1) and 8(a)(4) unfair labor practice case.

The language of the Supreme Court appears to make it clear that a withdrawal of the lawsuit is for this purpose equivalent to a showing of lack of merit.

There remains then the need for General Counsel to show an improper motive on the part of Respondent Company in instituting its civil lawsuit. In demonstrating that Respondent Company's motivation in instituting the lawsuit was unlawful, there may be some doubt as to this conclusion if the lawsuit was confined to a suit for an injunction, as Respondent Company arguably could seek such relief on the theory that the picketing and strike activity constituted a violation of the no-strike clause contained in the collective-bargaining agreement. See *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970). However, that would not be applicable to a suit for damages and other remedies against the employees which accompanied the request for the injunction. A suit for $500,000, in the circumstances, was clearly designated to frighten the employees and thereby discourage them from engaging in what has been found to be protected concerted activity protesting Respondent Company's commission of unfair labor practices. Serving papers on the employees at the picket line, or at their homes, certainly had the desired effect inasmuch as the picketing immediately ceased and the strike was over. Respondent Company went even further by serving certain of the strikers with contempt papers after all activity had been discontinued. I find that Respondent Company was clearly motivated by its desire to interfere with the employees' rights to engage in activities as a protest to unfair labor practices and even for economic reasons. It is evident from the record that Respondent Company was seeking to maintain its practices of preventing the part-timers from improving their conditions and, moreover, keeping its complement of union employees at a minimum. This would be just a perpetuation of the unfair labor practices already found herein. Accordingly, I find that by instituting the lawsuit in the state court, Respondent Company violated Section 8(a)(1) and (3) of the Act.

Moreover, the stipulation of discontinuance which employees were forced to sign in order to be even conditionally reinstated to employment, contained a provision that the lawsuit will be reinstituted in the event that they engaged in similar activity. By forcing employees to give up their rights to engage in protected activity under the Act on penalty of being subject to a civil suit, Respondent further violated Section 8(a)(1) of the Act.

The complaint further alleges that Respondent Union, acting through Sprofera, in violation of Section 8(b)(1)(A) and (2) of the Act, caused to be served on employees copies of an order to show cause and summons and complaint, in connection with the lawsuits commenced by the Company, and thereby attempted to cause and did cause the employees to cease from engaging in their strike and picketing. I find these allegations to be without merit.

The only evidence supporting the allegations is that Sprofera accompanied a process server in the picketed area and pointed out to him the individuals to whom he was required to deliver the summonses. Although I have found that the lawsuits instituted by Respondent Company were unlawful, and that Sprofera is a union agent, it does not necessarily follow that the Union through Sprofera's conduct violated the Act by aiding the Company in the prosecution of these suits. On the contrary, the record indicates that the legal actions against the strikers were exclusively the Company's ventures, in which the Union took no part. The impact of Sprofera's aid to the process server, which is the only connection between the Union and the lawsuits, in the context of the total coercive effect of the legal actions, was so brief and slight as to be de minimus. Moreover, the absence of any evidence of union participation in the lawsuits compels the conclusion that Sprofera's conduct in this incident was taken solely in her capacity as a supervisor and agent of Respondent Company.

G. *The New Contract and Gloria Gerosa*

At the hearing, the General Counsel amended the complaint to allege that Respondent Company violated Section 8(a)(1) and (3) of the Act by reducing the hours of part-timer Gloria Gerosa because of her nonmembership in the Union.

In early 1981 Respondents Union and Company agreed on a new collective-bargaining agreement to be effective July 11, 1981, to July 10, 1984. Insofar as the part-timers were concerned, the new agreement provided for an immediate increase of 10 cents an hour in April 1981 (prior to the actual commencement of the agreement), and another wage increase in September 1981. Among other things, the 1981 agreement changed the classification description from full-timer and part-timer as appeared in the prior agreement, to regular driver and nonregular driver. Another important change provided that a regular driver is one who operates schoolbuses on regularly assigned school routes for a minimum of 420 hours each quarter. The prior contract simply provided that a full-timer is one who is employed 7 hours a day on a regular basis. Moreover, this definition would seem to exclude time spent on charter runs, although the part-timers had been informed by Union Official Revellese that charter runs and similar work would be included in the computation of the 420 hours. It may also be noted that the Union continued to negotiate certain terms after the execution of the agreement so that in January 1982, the Respondents signed an agreement which provided that all full-time drivers under the prior agreement would be considered regular drivers under the cur-

rent agreement and accordingly were ''grandfathered'' in for that purpose.

During the hearing Respondents took the position that the execution of the new agreement effective in mid-1981, with the changes as indicated above, had the result of curing any defects or discrimination which may have existed under the prior agreement. Of course that contention is not acceptable, as no remedy has provided for the unfair labor practices which existed under the old agreement.

It appears that subsequent to the effective date of the new agreement, the number of employees now considered ''regular drivers,'' and coincidentally members of the Union, remained the same. Moreover, the record reveals that a number of drivers, now classified as ''non-regular,'' were driving the required 420 hours per quarter, and were not reclassified nor accepted to union membership. Illustrative of this result was the situation of Gloria Gerosa, an employee at the Bedford terminal since 1976. Gerosa testified that for at least 3 years, she had worked 41-1/2 hours a week without attaining full-timer classification, and of course, she was not a union member. She stated that during the week of April 5, 1982, one of her schools was to be closed and, as a result, she would lose over an hour a day, each day of the week. She asked the dispatcher at Bedford, Goodrow, for time to fill in and he refused. Gerosa said that she then went to see Sutton, the safety director, who told her to write down her runs and hours, and where they were located, and he would pass it on to the office in Ossining. According to Gerosa, who testified credibly, Sutton said that there were people trying to get into the Union, and if she had 420 hours, she could get into the Union. He also said there were only a few people who would get into the Union, and doubted if any of the van drivers would get in. He further said that the people who knew about the 420-hour requirement were trying to get more hours than normal and he wanted to put a stop to it. On April 8, she gave Sutton the slip indicating her hours and routes as requested. Subsequent to the Easter vacation, she was informed on her return on April 19, by Goodrow, that as of the following day, her run to Sunny Hill would be given to Bob Ayres, a full-time employee. This run involved taking an autistic child from Bedford to a special school in Connecticut. She was instructed to meet that day with Ayre and show him the location of the school and where the child was picked up. Actually she had had that particular run for 2 years prior to this date.

Silvanie testified with regard to the Gerosa incident that she had been running an excessive number of hours and her run to Sunny Hill could have been more economically performed by a regular full-time driver. He indicated that she was only one of a number of drivers who had time deducted from what he considered to be excessive runs. However, he could not name anyone else, while conceding that Gerosa's was the largest change that was made. He stated he was unaware that Gerosa had been running that route for over 2 years. I find in the circumstances, that Gerosa's run was cut so as to prevent her from attaining the new hourly standard provided in the contract and thereby denying her regular driver status, with its consequent wage increases and other benefits, because of her nonmembership, and her desire to attain membership in the Union. Noted also is the unrefuted testimony of Gerosa that Safety Director Sutton told her Respondent Company intended to reduce the hours of employees who were close to making the necessary hours and who were also thinking membership in the Union. Accordingly, I find that by reducing the hours of Gerosa, and failure to restore them, Respondent Company violated Section 8(a)(1) and (3) of the Act.[7]

H. *The Arbitration*

The 1981–1984 contract contained for the first time a grievance-and-arbitration procedure. In 1982 Respondent Union filed a grievance on behalf of 10 employees claiming that they had met the new 420 hours per quarter standard set by the contract for eligibility to be a ''regular'' driver. This dispute went to arbitration and in the fall of 1982, an arbitrator ruled that of the 10 employees, 2 of them should be converted from the nonregular to the regular status with all the benefits pertaining thereto.

As a result of this award, which was issued after the close of hearing, and on motion of counsel, received into this record, Respondent Company contends that this award settles the issues involved in the allegations here, as it meets the standards set forth in *Spielberg Mfg. Co*., 112 NLRB 1080 (1955). Such a contention borders on frivolity. In view of the violations of Section 8(b)(1)(A), by Respondent Union based on its failure properly to represent unit employees, particularly the part-timers who are not members, Respondent Union had an apparent conflict of interests in representing these grievants. *Aristo Foods*, 198 NLRB 543 (1972). Moreover the arbitration proceeding and award does not comport with the Board's recent standards for deferral to arbitration awards. Thus, the issue as to whether ten employees in 1982 had met the contractual standards for promotion to regular driver is not at all parallel to the overall issue of the instant case involving the question as to whether the Respondents were aligned in keeping part-time employees from attaining both full-time status and union membership. Finally it does not appear from the arbitrator's award that he considered or was even necessary to resolving the unfair labor practices. Accordingly I find that this case should not be deferred to the arbitration award as contended by Respondent Company. See *Olin Corp*., 268 NLRB 573 (1984).

I. *Individual Liability of Danzeisen*

The complaint names David Danzeisen as an individual Respondent, and the General Counsel contends that he, being the sole stockholder of Respondent Company and having been involved personally in unfair labor practices, should be held individually liable for the violations of the Act found here. It is conceded that Danzeisen is the sole stockholder of the corporations involved, and I have found that he was extensively involved in the unfair labor practices alleged in the complaint and, indeed, I have found that his conduct violated the Act. However, in relying on these two guidelines, the

[7] In this connection it is further noted that the General Counsel has made a prima facie case that Respondent Company reduced Gerosa's hours of work because of her nonmembership in the Union, and in furtherance of its unlawful practice, in conjunction with the Union to keep down the number of regular drivers and union drivers. Although Respondent Company contends its action was based on economic grounds, it has failed in its rebuttal based on my evaluation of the testimony of Manager Silvanie and the uncontradicted statements of Gerosa as to her conversations with Goodrow. Thus this finding of violation of Sec. 8(a)(3) is in accordance with standards set forth in *Wright Line*, 251 NLRB 1083 (1980).

General Counsel has omitted a third element which is also necessary for the conclusion sought.

In *Riley Aeronautics Corp*., 178 NLRB 495, 500 (1969), the Board stated as follows:

> ''[E]asily the most distinctive attribute of the corporation is its experience in the eye of the law as a legal entity and artificial personality distinct and separate from the stockholders and officers who compose it.'' Wormser, *Disregard of the Corporation Fiction and Allied Corporation Problems, (Baker, Voorhis and Company*, 1927), p. 11. ''The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception.'' *NLRB v. Deena Artware, Inc*., 361 U.S. 398, 402–403. Nevertheless, the corporate veil will be pierced whenever it is employed to perpetrate fraud, evade existing obligations, or circumvent a statute. *Isaac Schieber, et al., individually, and Allen Hat Co*., 26 NLRB 937, 964 enfd. 116 F.2d (C.A. 8). Thus, in the field of labor relations, the courts and Board have looked beyond organizational form where an individual or corporate employer was no more than an *alter ego* or a ''disguised continuance of the old employer,'' *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106); or was in active concert or participation in a scheme or plan or evasion (*NLRB v. Hopwood Retinning Co*., 104 F.2d 302, 304 (C.A. 2)); or siphoned off assets for the purposes of rendering insolvent and frustrating a monetary obligation such as backpay (*NLRB v. Deena Artware, Inc*., *supra*, 361 U.S. 398); or so integrated or intermingled his assets or affairs that ''no distinct corporate lines are maintained.'' (Id. at 403).

There is no evidence in this record indicating that the corporate veil should be pierced because of fraud, evasion of obligations, or circumvention of the statute as required by the holding in *Riley*. Nor is there any indication that assets of Respondent Company have been ''integrated or intermingled'' with those of Danzeisen. In such circumstances, I find that General Counsel has not shown sufficient facts or cause to find individual liability.[8]

Accordingly, I find that David Danzeisen is not individually liable for the unfair labor practices of Respondent Company and will recommend that the complaint herein be dismissed against him, individually.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondents set forth in section II, above, occurring in connection with the operations of Respondent Company described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce, and the free flow of commerce.

V. THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent Company and Respondent Union violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2), respectively, by maintaining in force and effect an arrangement and practice whereby part-time employees, none of whom were members of the Union, were effectively prevented from becoming full-time employees and members of the Union, despite the fact that many had attained eligibility pursuant to the relevant collective-bargaining agreements, and were thereby denied the higher pay rates and other benefits given to favored union members. Therefore, I shall recommend that Respondent Company and Respondent Union be ordered jointly and severally to make whole those nonunion part-time employees, who were denied full-time status and membership in the Union despite having achieved eligibility under the contracts, for any loss of earnings and benefits with interest that they may have suffered by reason of Respondents' discrimination against them since a date 6 months prior to the filing and service of charges here, and consistent with Section 10(b) of the Act. This remedy should include conversion to full-time status of those employees who, during the relevant period, had met the eligibility requirements set forth in the collective-bargaining agreements.

Having found, specifically, that part-time employee Gloria Gerosa had been prevented from achieving the full-time status under the provisions of the 1981–1984 agreement as a result of Respondent Company's unlawful reduction of the number of hours she worked each week, in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent Company make her whole for any loss of earnings with interest or other benefits she may have suffered by reason of the unlawful discrimination practiced against her, and, in addition, convert her to full-time status.

I have found that Respondent Company unlawfully discharged, in violation of Section 8(a)(3) and (1) of the Act by reason of their union and other protected concerted activities, the following named employees: Florence Parson, Helen Genco, Mary Ann Rescigno, Camille Papineau, Joseph Hughes, Rosemarie Stueck, Lauren Dickerson, and Diana Picucci. Accordingly I recommend that Respondent Company be ordered to reinstate them to their former positions or, if no longer available, to a substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings or other monetary loss they may have suffered as a result of the discrimination against them, less interim earnings, if any. The backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner described in *Florida Steel Corp*., 231 NLRB 651 (1977).[9]

In addition with respect to these discriminatees, Respondent Company should be ordered to convert to full-time driver or regular driver, any of these named employees who during the time periods referred to above had satisfied the standards

[8] See also *Contris Packing Co*., 268 NLRB 193 (1983); *Chef Nathan Sez Eat Here, Inc*., 201 NLRB 343 (1973).

[9] See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

for hours and/or time worked set forth in the relevant collective-bargaining agreements for such full-time or regular driver positions.

I have also found that a certain number of drivers had been discharged on January 9, 1981, and were also unfair labor practice strikers. These employees were conditionally reinstated on the following workday, and thereafter had been unconditionally reinstated on February 24, 1981. I recommend that those employees be made whole for any losses they may have sustained, either monetarily or in any other manner, during the period of their conditional reinstatement. Moreover, Respondent Company shall convert these employees, as with the discharged employees, to full-time driver or regular driver status if during the relevant periods they had achieved the contractual requirements for such conversion.[10]

I have found that Respondent Company, in violation of Section 8(a)(1) of the Act, instituted a lawsuit for damages against employees who engaged in protected concerted activities, and, in addition, commenced contempt actions against certain of the employees similarly engaged in the courts of the State of New York. These lawsuits have been withdrawn. I recommend that Respondent Company make the defendants in the civil complaints whole for any losses they may have sustained as a result of such litigation, including all legal expenses incurred in the defense of such suits.

Having found that Respondents, respectively violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act in the implementation and operation of the health, welfare, pension and supplemental unemployment funds, I recommend the following remedy.

That the Company and the Union be ordered jointly and severally to make whole those employees who, having met the criteria for regular or full-time employee status, were unlawfully denied that status and consequently excluded from participation in the funds. This shall include any loss of benefits and/or contributions which should have been made to the funds on their behalf, for the period 6 months prior to the filing and services of the charges herein, as is consistent with Section 10(b) of the Act.[11] I also recommend that Respondents be ordered to compensate the funds for any administrative expenses and loss of interest incurred by the funds as a result of their acceptance of retroactive benefit payments. *Longshoremen ILA Local 1593 (Caldwell Shipping)*, 243 NLRB 8 (1979), enfd. 644 F.2d 408 (5th Cir. 1981).

Additionally, having found that the Union and Company violated the Act by discriminatorily applying a settlement agreement regarding the supplemental unemployment benefit fund, I recommend that all employees at the time of settlement, who were excluded from participation, be awarded the amount they would have realized from the settlement but for the Respondents' unfair labor practices.

[10] The record reveals that the following named employees received memoranda from Respondent Company releasing them from lawsuits brought against them and reinstating them unconditionally with seniority and other previously held benefits. They are Tom Girling, Jule Prescott, Elizabeth Izzo, Roland Petruzzi, Jacob Werner, Theresa Kriner, John Myers, Peter Landolt, Alexandria Cortez, Thomas Larrywon, Frank J. Mahoney, Robert E. Pfaff, Dorothy Grove, John Fisher. There are indications that other part-timers were similarly involved and I leave it to the compliance stage of this proceeding to determine any other employees similarly situated.

[11] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a make-whole remedy. This determination is left to the compliance state. *Merryweather Optical Co.*, 240 NLRB 1213 fn. 7 (1979).

CONCLUSIONS OF LAW

1. Respondent Vanguard Tours, Inc., and its wholly owned subsidiary Bedford Bus Co., Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Vanguard violated Section 8(a)(1) of the Act as follows:

(a) Threatening part-time employees with loss of jobs should they continue seeking increased wages and better working conditions.

(b) Threatening closure of its Yorktown terminal as well as discharge if representatives of part-time employees persisted in attempting to obtain salary increases.

(c) Warning employees and threatening reprisals unless employees stay out of labor problems.

(d) Assaulting employees who were engaged in protected activities by concertedly not responding to radio calls.

(e) By maintaining an overly broad rule prohibiting discussion while on duty or on company property, thereby precluding solicitation or discussion on the employees' own time such as lunch and break periods.

4. By recognizing and dealing with certain employees who were both shop stewards and agents of the Union while in addition, acting as company supervisors, Respondent Vanguard interfered with the administration of Respondent Union in violation of Section 8(a)(2) and (1) of the Act.

5. By maintaining in cooperation with Respondent Union a disparate system of wages and benefits through which union members were favored over nonunion employees with regard to rates of pay, vacation, health and welfare contributions, and benefits and other conditions of employment, Respondent Vanguard violated Section 8(a)(1), (2), and (3) of the Act.

6. Respondent Vanguard further violated Section 8(a)(1), (2), and (3) of the Act by executing and maintaining a provision in its collective-bargaining agreement with Respondent Union which determined eligibility of employees for participation in a pension fund on the basis of membership in the Union.

7. Respondent Vanguard further violated Section 8(a)(1), (2), and (3) of the Act by settling the Union's lawsuit to recover payments due to a contractually provided supplemental unemployment benefit fund on the basis of lump sum payments to only full-time union member employees, despite the fact that the fund was applicable to all employees covered by the collective-bargaining agreement.

8. The strike and the picketing by the part-time employees at the Yorktown terminal commencing on January 9, 1981, was an unfair labor practice strike.

9. By engaging in surveillance of striking employees' union or other protected concerted activities, and by threatening strikers with discharge, and with loss of benefits and seniority unless they abandoned their strike, Respondent Vanguard further violated Section 8(a)(1) of the Act.

10. By discharging striking employees because they engaged in union or other protected concerted activities, and thereafter reinstating them with loss of seniority; and by re-

quiring strikers, as a condition of reinstatement, to sign a stipulation binding them to refrain from certain activities, Respondent Vanguard violated Section 8(a)(3) and (1) of the Act.

11. By discharging employees Genco, Rescigno, Papineau, Steuck, Parsons, Dickerson, and Hughes, and failing to reinstate them, because of their union and other protected concerted activities, Respondent Vanguard violated Section 8(a)(3) and(1) of the Act.

12. By reducing the hours of work of employee Gloria Gerosa, for unlawful discriminatory reasons, Respondent Vanguard violated Section 8(a)(3) and (1) of the Act.

13. By filing a civil lawsuit and seeking to recover compensatory and punitive damages in the Supreme Court of the State of New York against certain named striking employees, who had been engaged in an unfair labor practice strike and other protected concerted activities, Respondent Vanguard violated Section 8(a)(1) and (3) of the Act. Additionally by requiring certain of the named defendants in the civil action, as a condition of reinstatement, to sign a stipulation of discontinuance of the action which provided, among other things, for reinstitution of the lawsuit if the defendants engaged in similar activities, Respondent Vanguard further violated Section 8(a)(1) and (3) of the Act.

14. Respondent Union, through its shop stewards and agents, restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act by engaging in the following conduct:

(a) Threatening employees by advising them to stay out of labor problems and not get involved.

(b) Assaulting employees who have engaged with other employees in protected concerted activities.

(c) Refusing to show to employees the collective-bargaining agreement which determines their rights.

(d) Engaging in surveillance of the activities of striking employees and writing their names on a pad of paper.

(e) Threatening discharge of employees engaged in an unfair labor practice strike.

15. Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by maintaining an arrangement and practice in cooperation with Respondent Vanguard, whereby the latter favors union members over nonunion employees who are also included in the bargaining unit, in the manner set forth above in Conclusion of Law 5.

16. Respondent Union further violated Section 8(b)(1)(A) and (2) of the Act by executing and maintaining a collective-bargaining agreement with Respondent Vanguard which provided for a pension plan in which participation was based on membership in the Union; and moreover by settling litigation concerning nonpayment by Respondent Vanguard to a supplemental unemployment fund which on its face covered all employees in the bargaining unit, on the basis of payments made only to employees who were members of the Union.

17. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

18. The complaint shall be dismissed insofar as it alleges violations against Respondent David Danzeisen, individually.

19. The complaint shall be dismissed with respect to allegations not specifically found to be violative of the Act.

[Recommended Order omitted from publication.]

Leonard Grumbach, Esq., for the General Counsel.

Joseph S. Rosenthal, Esq. (Friedlander, Gaines, Cohen, Rosenthal & Rosenberg), of New York, New York, for Respondent Company.[1]

Roy Barnes, Esq., of Hempstead, New York, for Respondent Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge. On 17 November 1986, the Board remanded this proceeding to the administrative law judge for further consideration consistent with the Decision and Order in *Long Stretch Youth Home*, 280 NLRB 678 (1986), and *Res-Care*, 280 NLRB 670 (1986).

By letter dated 25 November 1986, I requested the parties to submit their views by 12 December as to the necessity for reopening the record on the jurisdictional issue raised by the above-cited cases and thereafter, at the request of Respondent Company I extended the time of the parties to do so until 9 January 1987. Respondent Company and Union then requested that the record be reopened, while the General Counsel took the position that this was not necessary. After consideration, I decided that the record should be reopened, and wrote the parties to that effect on 13 January 1987, setting a hearing date for 2 February unless they were notified to the contrary. Having been only informed that Respondent Company needed more time to obtain its witnesses, I advised that I would be amenable to a date in March, and the parties thereupon agreed to a reopened hearing on 2 March 1987, which I confirmed by letter dated 27 January. Counsel for Respondent Company then wrote on 17 February requesting that the hearing be rescheduled from 2 March to 6 April, ''because the undersigned will be out of the State and unable to attend on said date.'' In view of the lapse of time and belief that the parties had cleared their calendars for the March date, by letter dated 18 February I denied the request for postponement to 6 April. Upon further oral requests by counsel, I thereafter agreed to further postpone the hearing to 10 March.

The hearing on the remand was convened on 10 March 1987. All parties were present but no one presented any witnesses. It was the General Counsel's position that the record in the underlying proceeding was sufficient to make a determination on the issue presented. Both the Respondent Company and Respondent Union stated for the record that they they relied on the Board's holding in *Res-Care*, supra. Moreover the parties waived the filing of briefs.

On the entire record I make the following

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS

The issue raised by this remand is whether the Board should assert jurisdiction over Respondent Company in view of its relationship with the school districts, which are exempt entities. The record contains certain facts relevant to a discussion of this issue. These are derived from the testimony of John Silvanie, then general manager of Respondent Com-

[1] Subsequent to the close of the remanded proceeding, by letter dated 14 April 1987, Rosenthal, counsel for Respondent Company requested that the firm of Bondy & Schloss, 6 East 43d Street, New York, New York 10017, be substituted for the above-noted firm. Rosenthal indicated he is now a member of Bondy & Schloss. The substitution is noted and the records should be corrected accordingly.

pany. At this point it may be noted that David Danziesen, who had been president of Respondent Company as well as a sole stockholder, had, in the interim, sold his interest in the Company, according to the statement of counsel for Respondent Company at the remanded hearing. In addition it was also stated that Danziesen was in Florida at the time and therefore unavailable. Moreover Silvanie had apparently left the employ of Respondent Company, and counsel stated he could not be located. Silvanie's original testimony was basically uncontroverted on matters relevant to this issue. He testified that he was responsible for the direction of the Company in all matters except financial. He formulated employee and supervisory policy, including the handling of all labor negotiations with the Union, serious grievances, and collective bargaining. While Silvanie stated that he delegated responsibilities concerning maintenance, safety and personnel, he emphasized that there was no delegation concerning labor relations decisions. Discharges of employees were all handled through his office, and discipline was handled locally with the exception of serious infractions.

Silvanie testified that the school districts determined the number of buses to be operated by Respondent Company. The districts also decided the routes to be followed except in this instance, it may be done in consultation with the terminal managers or head dispatchers of the Company. In addition the superintendent of each school district or his representative must approve each driver, and may remove drivers for any reason, and also make recommendations as to assignment of drivers to certain routes.

In Yorktown, a typical district, there is a superintendent of transportation who is employed and paid by the school district. Prior to the beginning of each school year, every schoolbus driver in the State of New York is required to undergo a physical examination and reapply to the school district in which she or he is driving. The superintendent receives the reports on the physical examination and the reapplication and the most recent of each driver's abstract of driving. He then will determine whether that person is to be recertified to drive in the particular school district. As noted the superintendent can ask the Company to remove a driver from a route permanently or temporarily, or request transfer of the driver to another route.

Silvanie was able to give a few examples of such action on the part of the school district. He recalled that the superintendent of transportation in Yorkville was concerned about a driver who had allegedly been drinking between the a.m. and p.m. runs. After conversations with the driver, Silvanie said that the person was either dismissed or may have resigned. In addition there was a request or a demand that a driver on a Yorktown School run be removed. The Company complied but then, at the request of the Union, kept the employee and transferred him to another division. Silvanie also recalled that an employee, Helen Genco, was transferred to another route pursuant to the request of an assistant principal who claimed that she was unable to cope with some rambunctious kids and that the run needed a ''male, authorative figure.''

Although the record contains a good deal of evidence concerning collective-bargaining negotiations between the Respondent Union and the Respondent Company including meetings at which there was present representatives of Company, Union and an employee-committee on behalf of part-timers, there is no indication of presence or participation by any representative of the school districts.

In both *Res-Care* and *Long Stretch* the Board determined to apply the principles set forth in *National Transportation Service*, 240 NLRB 565 (1979), in which it held that the jurisdictional test is whether an employer has control over the conditions of employment of its employees in sufficient manner so as to enable it to bargain effectively with a union. In *Res-Care* the Board found that the exempt entity had such control over the employer's labor relations that the employer could not engage in effective bargaining with the Union, and therefore decided that jurisdiction should not be exercised. Respondent Company's and Respondent Union's reliance on *Res-Care* in the instant case is misplaced. More applicable to the situation here is the decision in *Long Stretch*, in which it was found that the employer did ''retain sufficient control over economic terms and conditions of employment essential to meaningful bargaining.'' In *Long Stretch* it was found that, while the exempt entity did have some very limited control over hiring and firing such as a requirement to fill certain job classifications and that employees meet certain limited qualifications for those positions, it was nonetheless determined that this did not ''significantly limit its ability to engage in meaningful bargaining.''

In this case is is established that a typical district would have a superintendent of transportation; that drivers employed by Respondent Company were required to take physical exams, submit to the school district their driving records, reapply each year, and have their record recertified. On occasion the Company would honor complaints from the school district that a driver was not satisfactory, and even requests from the superintendent that a driver be removed either permanently, temporarily, or transferred to another route. Examples of this occurring are very few. In addition school districts normally determine how many buses Respondent operated and consult with Respondent as to the routes followed by the buses.

On the basis of these facts it appears that a more recent decision of the Board, *Rustman Bus Co.*, 282 NLRB 152 (1986), is more directly in point. In *Rustman*, pursuant to a remand similar to this proceeding, the Board determined that the ''monitoring consists largely of operational controls and is not so restrictive as to preclude the employer from engaging in meaningful collective bargaining.'' In *Rustman*, as in the instant case, the employer's contracts with the school districts required that drivers meet minimum requirements such as good driving records, no felony convictions, medical examinations, and the like. In addition the districts did not participate in the hiring and firing processes. However the exempt entity did have the right to ask that a driver be removed from a particular run, which did not prevent the employer from reassigning the employee to a different run or different program. Also complaints as to a driver's conduct or performance were received and investigated. However in *Rustman* the Board found that these rights and actions by the school district were not sufficient to infringe on day-to-day operations or control of labor relations.

In addition to the similarities to *Rustman* described above, the instant case arises in a different posture. *Res-Care*, *Long Stretch*, and *Rustman* are all representation proceedings. The instant case is an unfair labor practice proceeding which reveals, among other things, an extensive history of collective

bargaining. The record indicates evidence and occurrences at various collective bargaining and other types of meetings in which the participants were identified. As noted above, in none of these sessions was there any appearance by any representative of a school district. More importantly there is no evidence that Respondent Company and Respondent Union were in any manner inhibited by the Company's contractual relationship with an exempt entity. Indeed Silvanie testified that he formulated employee policy, supervisory policy, and handled labor negotiations with the Union including collective-bargaining negotiations and did not delegate that power. The record shows that on one occasion when representatives of the part-timers were seeking wage increases, Danziesen stated that if he were to agree to their demands it is possible that he would have to increase the bid for a school district contract and perhaps lose it. However that is the economic risk that any employer faces in collective bargaining. I find therefore, on the basis of the entire record, that Respondent Company was in control of labor relations on a day-to-day basis and was not impeded by any action or conduct by an exempt entity with respect to its ability to engage in meaningful collective bargaining with Respondent Union.

Accordingly, I find that jurisdiction over Respondent Company was properly asserted, consistent with the Board's decisions in *Res-Care*, *Long Stretch*, and *Rustman*, and therefore recommend that the Board affirm the Order issued in my decision in this proceeding with respect to jurisdiction.